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Transcript
of
Record

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~288~~ 47

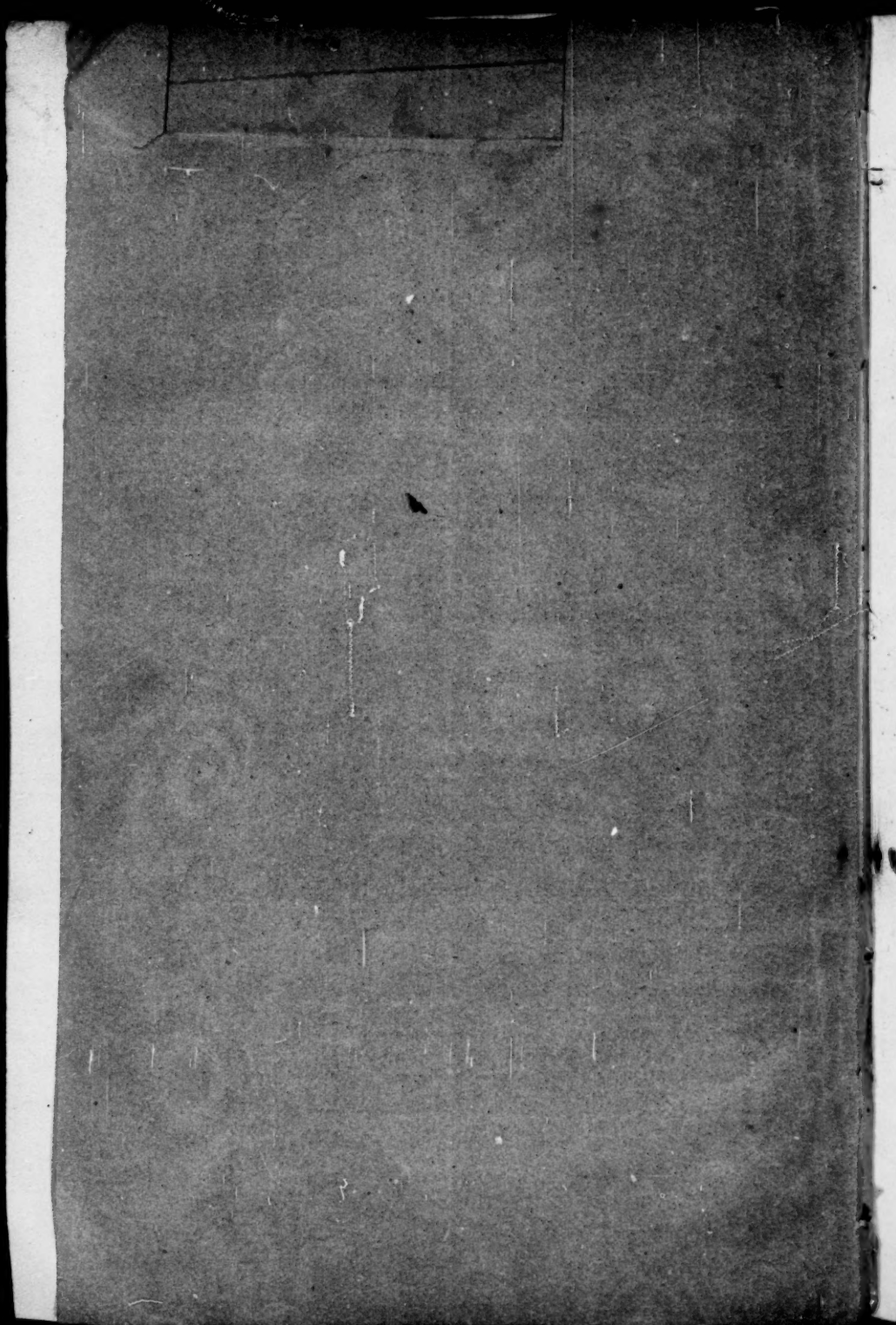
THE ST. LOUIS INSURANCE COMPANY, PLAINTIFF IN ERROR,

VS.

THE ST. LOUIS, VANDALIA, TERRE HAUTE AND INDIAN-
APOLIS RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 17, 1878.



SUPREME COURT OF THE UNITED STATES.

No. 288.

THE ST. LOUIS INSURANCE COMPANY, PLAINTIFF IN ERROR,

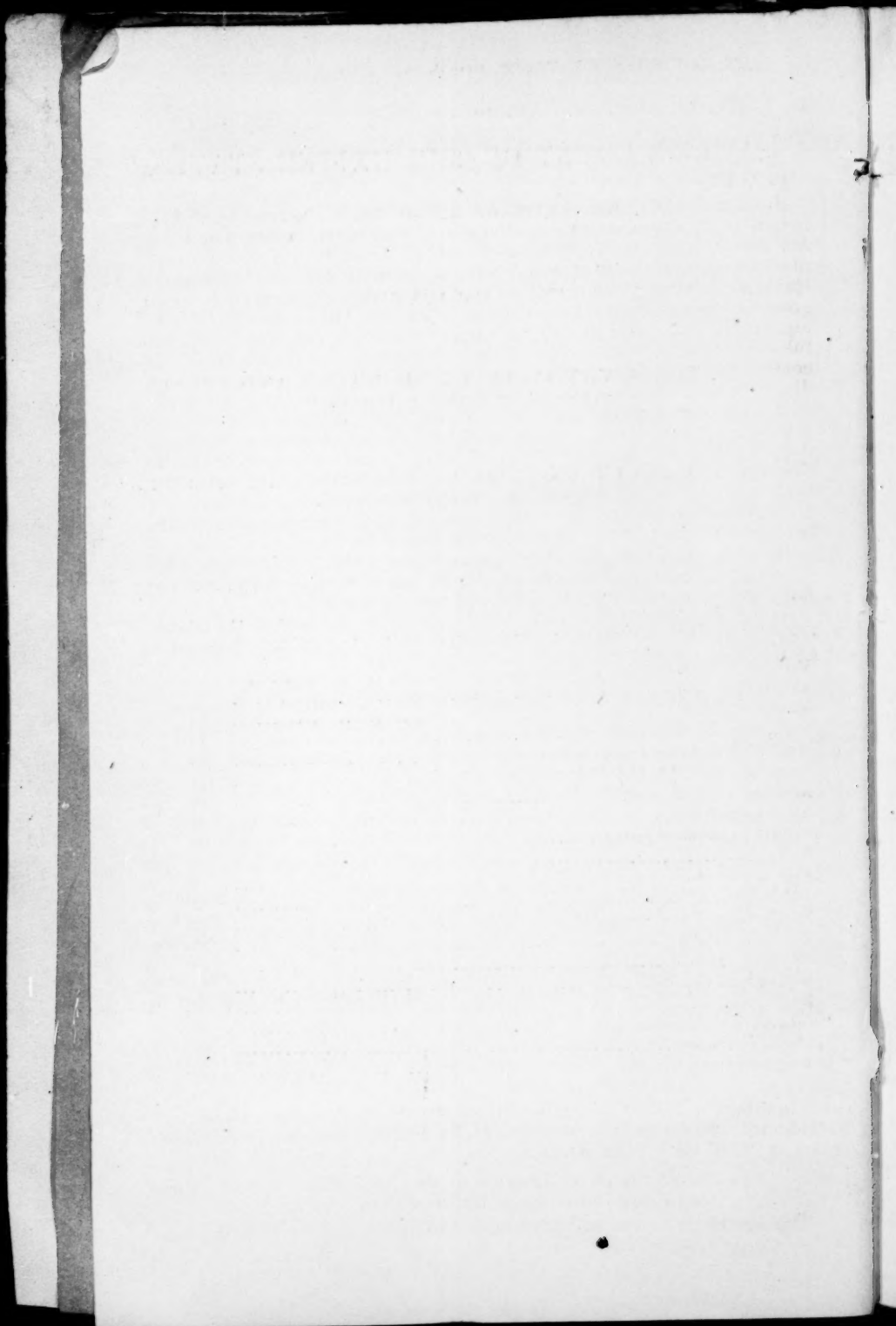
VS.

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INDEX.

	Original.	Print.
Writ of error	1	1
Return to writ.....	2	1
Citation	3	1
Petition	5	2
Summons	13	5
Return of sheriff	13	5
Petition for removal to United States court	15	5
Bond for removal to United States court	15	6
Order for removal to United States court	17	6
Answer	19	7
Amended petition	19	7
Answer to amended petition	29	10
Reply	37	12
Special finding.....	39	12
Judgment	83	28
Motion for new trial overruled.....	85	28
Writ of error allowed	85	28
Bill of exceptions	85	29
Motion for a new trial.....	87	29
Bond	89	30
Opinion of the court.....	91	30
Clerk's certificate	97	32
Assignment of errors	99	32



1 UNITED STATES OF AMERICA, ss :

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, greeting :

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the March term, 1878, thereof, between the St. Louis Insurance Company, plaintiff, against the St. Louis, Vandalia, Terre Haute and Indianapolis Railroad Company, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 2d day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

Issued at office, in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[SEAL.]

M. M. PRICE,
Clerk Circuit Court United States Eastern District of Missouri,
By A. P. SELBY, Deputy.

Allowed by

SAMUEL TREAT, Judge.

2 *Return to writ.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss :

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name, and affix the seal of said circuit court, at office in the city of St. Louis, this 17th day of May, A. D. 1878.

[SEAL.]

M. M. PRICE,
Clerk of said Court,
By A. P. SELBY, Deputy.

(Indorsed :) No. 797. United States circuit court, eastern district of Missouri. St. Louis Insurance Co. vs. St. Louis, Vandalia, Terre Haute & Ind. R. R. Co. Writ of error.

3 The United States of America to the St. Louis, Vandalia, Terre Haute and Indianapolis Railroad Company, greeting :

You are hereby cited and admonished to be and appear at a Supreme

Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein the St. Louis Insurance Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this 2d day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

SAMUEL TREAT,

*Judge United States Circuit Court,
Eastern District of Missouri.*

Service of citation accepted this 6th day of May, 1878.

EVERETT W. PATTESON,

Att'y for Def't in Error.

4 (Indorsed :) 797. United States court district
of Missouri, St. Louis Insurance Co. vs. St. Louis, Vandalia,
Terre Haute & Ind. R. R. Co. Citation. Filed May 2, 1878. M. M.
Price, clerk.

5, 6 THE UNITED STATES OF AMERICA,
Eastern District of Missouri, et :

Be it remembered that heretofore, to wit, on the 20th day of March, 1876, there was filed in the office of the clerk of the circuit court of the United States for the eastern district of Missouri a transcript from the circuit court of St. Louis county, which transcript is in words and figures following, to wit :

STATE OF MISSOURI,

County of St. Louis, ss :

Be it remembered that on the 20th day of November, A. D. 1875, there was filed in the office of the clerk of the circuit court of St. Louis County a petition, which is in words and figures following, to wit :

Petition.

In the circuit court of St. Louis County, Dec. term, 1875.

ST. LOUIS COUNTY, ss :

THE ST. LOUIS INSURANCE COMPANY, PLAINTIFF, }

vs.

THE ST. LOUIS, VANDALIA, TERRE HAUTE AND }
Indianapolis Railroad Company, defendant.

The plaintiff, the St. Louis Insurance Company, a corporation under and by virtue of the laws of the State of Missouri, complains of the defendant, the St. Louis, Vandalia, Terre Haute and Indianapolis Railroad Company, a railroad company and corporation under and by virtue of the laws of the State of Illinois, owning and operating a road terminating opposite to the city of St. Louis, and whose chief office and place of business is in the said city of St. Louis and State of Missouri, and says that heretofore, to wit, on the 1st day of January, 1873, and ever since,

the defendant, and the Erie and Pacific Dispatch, a corporation under the laws of the State of Kansas; the Cleveland, Columbus and Indiana Central Railroad Company, a corporation under the laws of the States of Ohio and Indiana; the Atlantic and Great Western Railway Company, a corporation under the laws of the States of Ohio and Pennsylvania;

the Erie Railway Company, a corporation under the laws of the 7, 8 States of New York, New Jersey, and Pennsylvania; and the Oceanic Steam Transportation Company, a corporation under the laws of the State of New York, jointly formed and constituted a continuous and connected line of common carriers by and over the railroads of the several railroad and railway companies aforesaid, and by the vessels owned or operated by said Oceanic Steam Transportation Company between said city of St. Louis and the city of Liverpool, in England; and, as such line of common carriers, they jointly carried on the business of transporting goods and merchandise between said cities, for hire—they jointly charging and receiving for such transportation certain freight or hire, which they divided amongst themselves in proportions mutually understood and agreed to by and between themselves, but to the plaintiff unknown.

That on or about the 20th day of January, 1873, the firm of Adolphus Meier & Co., of St. Louis aforesaid, and the firm of C. G. Meier & Co., being joint owners of 567 bales of compressed cotton, marked V. I. C., then at St. Louis aforesaid, of great value, to wit, one hundred thousand dollars, there delivered the same to said line of common carriers, to be carried and transported by said line from St. Louis aforesaid to Liverpool aforesaid, and there delivered by said C. G. Meier & Co.; and said line of common carriers then and there accepted and received said cotton and agreed to carry and transport the same to said city of Liverpool, and there deliver the same as aforesaid, for certain reasonable hire and reward in that behalf then agreed by said firms of Adolphus Meier & Co. and C. G. Meier & Co., to be paid to said line of carriers; and thereupon it then became the duty of said line of common carriers, and of each and every member thereof, whilst said line had said cotton in their possession, to take due and proper care thereof, and within a reasonable time, and without unusual or unnecessary delays, to carry and transport the same from St. Louis aforesaid to Liverpool aforesaid, and there deliver the same to said C. G. Meier & Co.,

9, 10 as aforesaid. Yet said line of common carriers, and each and every member thereof, not regarding their duty in that behalf, did not, nor would, within a reasonable or proper time carry or transport said cotton from St. Louis aforesaid to Liverpool aforesaid, but proceeded negligently, carelessly, and with great, unusual, and unnecessary delays to carry and transport the same, and did not, nor would, whilst they had said cotton in their possession take due or proper care thereof, but wholly neglected and failed so to do, and so negligently and dilatorily carried the same, and took such bad care thereof that afterwards and whilst said cotton was so in their possession, and in transit between said cities of St. Louis and Liverpool, to wit, on the 21st day of March, 1873, a large part of said cotton, to wit, 132 bales thereof, was wholly destroyed and lost to said Adolphus Meier & Co. and C. G. Meier & Co., and never delivered at Liverpool aforesaid.

And plaintiff avers that said 132 bales had been by said owners thereof theretofore sold to arrive in Liverpool aforesaid at a great price, to wit, ten thousand pounds, English gold currency, and by reason of said destruction and non-delivery thereof said owners lost said sale and said price thereof, and suffered damage in a large sum of money,

to wit, fifty thousand dollars. And afterwards, to wit, on the 1st day of March, 1875, said damages being wholly unpaid, said owners, Adolphus Meier & Co. and C. G. Meier & Co., for value, assigned in writing and transferred to plaintiff all their said damages, and all claim and right of action therefor, of which defendant had due notice. Yet neither defendant nor said line of carriers, nor either of them, has, although often requested, paid to plaintiff said damages, or part thereof. Wherefore plaintiff prays judgment for said damages, with interest and costs. And for a second cause of action plaintiff states that on or about the 18th day of February, 1873, the said firms of Adolphus Meier & Co. and C. G. Meier & Co., being joint owners of 1,047 other bales of compressed cotton, marked P. I. G., then at St. Louis, aforesaid, 11, 12 said, of great value, to wit, of the value of two hundred thousand dollars, there delivered the same to said line of common carriers, to be carried and transported by said line from St. Louis aforesaid to Liverpool aforesaid, and there deliver to said C. G. Meier & Co., and said line of common carriers then and there accepted and received said cotton, and agreed to carry and transport the same to said city of Liverpool, and there deliver to said C. G. Meier & Co. as aforesaid, for certain reasonable hire and reward in that behalf then agreed by said firms, owners thereof, as aforesaid, to be paid to said line of carriers. And thereupon it became the duty of said line of common carriers, and of each and every member thereof, whilst said line had said cotton in their possession, to take due and proper care thereof, and within a reasonable time, and without unnecessary or unusual delay to carry and transport the same from St. Louis aforesaid to Liverpool aforesaid, and there deliver the same to said C. G. Meier & Co. as aforesaid.

Yet said line of common carriers, and each and every member thereof, not regarding their duty in that behalf, did not, nor would, within a reasonable or proper time or transport said cotton from St. Louis aforesaid to Liverpool aforesaid, but proceeded negligently, carelessly, and with great, unusual, and unnecessary delays to carry and transport the same, and did not, nor would, whilst they had said cotton in their possession take due or proper care thereof, but wholly neglected and failed so to do, and so negligently and dilatorily carried the same, and took such bad care thereof that afterwards, and whilst said cotton was so in their possession and in transit between said cities of St. Louis and Liverpool, to wit, on the 21st day of March, 1873, a large part of said cotton, to wit, 564 bales thereof, was wholly destroyed and lost to said owners thereof and never delivered at Liverpool aforesaid.

And plaintiff avers that said 564 bales of cotton had been by said owners thereof theretofore sold, to arrive in Liverpool aforesaid, at a great price, to wit, twenty-five thousand pounds, English gold 13, 14 currency, and by reason of said destruction and non-delivery said owners lost said sale and said price thereof, and suffered damage in a large sum of money, to wit, one hundred thousand dollars. And afterwards, to wit, on the 1st day of March, 1875, said damages being wholly unpaid, said owners Adolphus Meier & Co. and C. G. Meier & Co., for value, assigned in writing and transferred to plaintiff all their said damages, and all claim and right of action therefor, of which defendant had due notice. Yet neither defendant nor said line of carriers nor either of them has, although often requested, paid to plaintiff said damages, or any part thereof.

Wherefore plaintiff prays judgment for said damages, with interest and costs.

JOHN G. CHANDLER,
Att'y for Plaintiff.

Summons.

COUNTY OF ST. LOUIS, ss :

The State of Missouri to the sheriff of St. Louis County, greeting :

We command you to summon the St. Louis, Vandalia, Terre Haute & Indianapolis Railroad Company to appear before the judges of our circuit court, on the first day of the next term thereof, to be held in the city of St. Louis, within and for the county of St. Louis, on the first Monday of December next, then and there to answer the complaint of the St. Louis Insurance Company, as set forth in the annexed petition. And have you then and there this writ.

Witness J. Fred Thornton, clerk of our said court, with the seal thereof hereto affixed, at office in the city of St. Louis, this 20th day of Nov'r in the year of our Lord eighteen hundred and seventy-five.

[SEAL.]

J. FRED. THORNTON, *Clerk.**Sheriff's return.*

Executed this writ in St. Louis County, on the 20th day of November, 1875, by delivering a copy of the writ and petition as furnished by the clerk to E. Reynolds, contracting agent of the St. Louis, Vandalia, Terre Haute and Indianapolis Railroad Company, who was in the business office of said company, and had charge thereof at the time of said service; the president or other chief officer cannot be found in my county.

EMILE THOMAS, *Sheriff,*
By JOS. GREENEWALD, *Deputy.*

And afterwards, to wit, Dec. 7th, 1875, there was filed in said cause a petition for removal to U. S. court and bond, which petition and bond are in words and figures following, to wit :

Petition for removal to U. S. circ't court.

In circuit court, St. Louis County, Missouri.

ST. LOUIS INSURANCE CO., PLAINTIFF, }

vs.

THE ST. LOUIS, VANDALIA, TERRE HAUTE, }

& Indianapolis Railroad Co., defendant.

And now comes the defendant above named, and states that the matter in dispute in said cause exceeds, exclusive of costs, the sum or value of five hundred dollars; that the plaintiff in said action is a corporation created by the laws of the State of Missouri, and is a citizen thereof; that the defendant is a corporation created under the laws of the State of Illinois, and has its chief office out of this State, so that in said action there is a controversy between citizens of different States. Wherefore said defendant prays that said action may be removed to the United States circuit court for the eastern district of Missouri.

N. STEVENS,

Ag't for Defendant.

Subscribed and sworn to before me this 6th day of December, A. D. 1875.

[SEAL.]

AMOS M. THAYER,
Notary Public, St. Louis County, Mo.

to wit, fifty thousand dollars. And afterwards, to wit, on the 1st day of March, 1875, said damages being wholly unpaid, said owners, Adolphus Meier & Co. and C. G. Meier & Co., for value, assigned in writing and transferred to plaintiff all their said damages, and all claim and right of action therefor, of which defendant had due notice. Yet neither defendant nor said line of carriers, nor either of them, has, although often requested, paid to plaintiff said damages, or part thereof. Wherefore plaintiff prays judgment for said damages, with interest and costs. And for a second cause of action plaintiff states that on or about the 18th day of February, 1873, the said firms of Adolphus Meier & Co. and C. G. Meier & Co., being joint owners of 1,047 other bales of compressed cotton, marked P. I. G., then at St. Louis, aforesaid, 11, 12 said, of great value, to wit, of the value of two hundred thousand dollars, there delivered the same to said line of common carriers, to be carried and transported by said line from St. Louis aforesaid to Liverpool aforesaid, and there deliver to said C. G. Meier & Co., and said line of common carriers then and there accepted and received said cotton, and agreed to carry and transport the same to said city of Liverpool, and there deliver to said C. G. Meier & Co. as aforesaid, for certain reasonable hire and reward in that behalf then agreed by said firms, owners thereof, as aforesaid, to be paid to said line of carriers. And thereupon it became the duty of said line of common carriers, and of each and every member thereof, whilst said line had said cotton in their possession, to take due and proper care thereof, and within a reasonable time, and without unnecessary or unusual delay to carry and transport the same from St. Louis aforesaid to Liverpool aforesaid, and there deliver the same to said C. G. Meier & Co. as aforesaid.

Yet said line of common carriers, and each and every member thereof, not regarding their duty in that behalf, did not, nor would, within a reasonable or proper time or transport said cotton from St. Louis aforesaid to Liverpool aforesaid, but proceeded negligently, carelessly, and with great, unusual, and unnecessary delays to carry and transport the same, and did not, nor would, whilst they had said cotton in their possession take due or proper care thereof, but wholly neglected and failed so to do, and so negligently and dilatorily carried the same, and took such bad care thereof that afterwards, and whilst said cotton was so in their possession and in transit between said cities of St. Louis and Liverpool, to wit, on the 21st day of March, 1873, a large part of said cotton, to wit, 564 bales thereof, was wholly destroyed and lost to said owners thereof and never delivered at Liverpool aforesaid.

And plaintiff avers that said 564 bales of cotton had been by said owners thereof theretofore sold, to arrive in Liverpool aforesaid, at a great price, to wit, twenty-five thousand pounds, English gold 13, 14 currency, and by reason of said destruction and non-delivery said owners lost said sale and said price thereof, and suffered damage in a large sum of money, to wit, one hundred thousand dollars. And afterwards, to wit, on the 1st day of March, 1875, said damages being wholly unpaid, said owners Adolphus Meier & Co. and C. G. Meier & Co., for value, assigned in writing and transferred to plaintiff all their said damages, and all claim and right of action therefor, of which defendant had due notice. Yet neither defendant nor said line of carriers nor either of them has, although often requested, paid to plaintiff said damages, or any part thereof.

Wherefore plaintiff prays judgment for said damages, with interest and costs.

JOHN G. CHANDLER,
Att'y for Plaintiff.

Summons.

COUNTY OF ST. LOUIS, ss :

The State of Missouri to the sheriff of St. Louis County, greeting :

We command you to summon the St. Louis, Vandalia, Terre Haute & Indianapolis Railroad Company to appear before the judges of our circuit court, on the first day of the next term thereof, to be held in the city of St. Louis, within and for the county of St. Louis, on the first Monday of December next, then and there to answer the complaint of the St. Louis Insurance Company, as set forth in the annexed petition. And have you then and there this writ.

Witness J. Fred Thornton, clerk of our said court, with the seal thereof hereto affixed, at office in the city of St. Louis, this 20th day of Nov'r in the year of our Lord eighteen hundred and seventy-five:

[SEAL.]

J. FRED. THORNTON, *Clerk.**Sheriff's return.*

Executed this writ in St. Louis County, on the 20th day of November, 1875, by delivering a copy of the writ and petition as furnished by the clerk to E. Reynolds, contracting agent of the St. Louis, Vandalia, Terre Haute and Indianapolis Railroad Company, who was in the business office of said company, and had charge thereof at the time of said service; the president or other chief officer cannot be found in my county.

EMILE THOMAS, *Sheriff,*
By JOS. GREENEWALD, *Deputy.*

And afterwards, to wit, Dec. 7th, 1875, there was filed in said cause a petition for removal to U. S. court and bond, which petition and bond are in words and figures following, to wit :

Petition for removal to U. S. circ't court.

In circuit court, St. Louis County, Missouri.

ST. LOUIS INSURANCE CO., PLAINTIFF,
vs.

THE ST. LOUIS, VANDALIA, TERRE HAUTE,
& Indianapolis Railroad Co., defendant.

And now comes the defendant above named, and states that the matter in dispute in said cause exceeds, exclusive of costs, the sum or value of five hundred dollars; that the plaintiff in said action is a corporation created by the laws of the State of Missouri, and is a citizen thereof; that the defendant is a corporation created under the laws of the State of Illinois, and has its chief office out of this State, so that in said action there is a controversy between citizens of different States. Wherefore said defendant prays that said action may be removed to the United States circuit court for the eastern district of Missouri.

N. STEVENS,

Ag't for Defendant.

Subscribed and sworn to before me this 6th day of December, A. D. 1875.

[SEAL.]

AMOS M. THAYER,
Notary Public, St. Louis County, Mo.

Bond for removal.

The St. Louis, Vandalia & Terre Haute & Indianapolis Railroad Company as principal, and Nathan Stevens & Amos M. Thayer as sureties, acknowledge themselves to owe and stand indebted to the St. 17, 18 Insurance Company in the penal sum of one thousand dollars, for the payment whereof in lawful money we bind ourselves, our heirs and legal representatives, jointly and severally, firmly by these presents, sealed with our seals, and dated at St. Louis, Mo., this 6th day of December, A. D. 1875.

Conditioned as follows, however, that this obligation shall become void, providing that the above named principal shall, on or prior to the 1st day of the next term of the United States circuit court for the eastern district of Missouri, enter his appearance therein in the above action, and also file in said court a true copy of the record in the above entitled suit, and also pay all costs that may be awarded by said United States circuit court if said court shall hold that said suit was wrongfully or improperly removed to said court, but otherwise this obligation shall be and remain in full force.

ST. LOUIS, VANDALIA, TERRE HAUTE AND INDIANAPOLIS R. R. CO.,

By N. STEVENS, *Ag't.*

NATHAN STEVENS. [SEAL.]

AMOS M. THAYER. [SEAL.]

Approved by the court December 7th, 1873.

Attest:

J. FRED. THORNTON, *Clk.*

At the special term, being the December term, A. D. 1875, of said court, the following proceedings were had in said cause, to wit:

Order of removal.

TUESDAY, December 7th, 1875.

On petition of defendant, by attorney, this day filed, it is ordered by the court that on the defendant giving bond in the sum of one thousand dollars, to be approved by the court, that the clerk of this court forthwith certify to the circuit court of the United States for the eastern district of Missouri a full, true, and complete transcript of the record and proceedings in this cause, as fully as the same remains of record in his office.

Bond filed and approved.

19, 20 STATE OF MISSOURI,
County of St. Louis, ss:

I, J. Fred Thornton, clerk of the circuit court of St. Louis County, do hereby certify the foregoing to be a true, full, and complete transcript of the record and proceedings in the above entitled cause, as fully as the same remain on file and of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at office in the city of Saint Louis, this 25th day of January, A. D. 1876.

[SEAL.]

J. FRED THORNTON, *Clerk.*

And afterwards, on the 20th day of March, 1876, the defendant filed its answer in said cause, which is in words and figures as follows, to wit:

Answer.

In circuit court of U. S., eastern district of Missouri, March term, 1876.

ST. LOUIS INSURANCE CO., PLAINTIFF,	}
<i>vs.</i>	
THE ST. LOUIS, VANDALIA, TERRE HAUTE, & Indianapolis Railroad Company, defend- ant.	

And now comes the defendant named above, and for an answer to the two causes of action in said petition contained, says that it denies each and every material allegation in said petition contained, and that it demands strict proof thereof.

Wherefore it prays that said action be dismissed, and for its costs, &c.

AMOS M. THAYER,

For Defendant.

And afterwards, to wit, at the September term, 1876, of said court, and on the 17th day of October, 1876, the plaintiff, by leave of court, filed an amended petition herein, which is in the words and figures following, to wit:

Amended petition.

21, 22 In the circuit court of the U. S. for the eastern district of Missouri. Sept. term, 1876.

EASTERN DISTRICT OF MISSOURI, ss:

THE ST. LOUIS INSURANCE COMPANY, PLAINT-	}
iff,	
<i>vs.</i>	
ST. LOUIS, VANDALIA, TERRE HAUTE, & INDI-	}
anapolis Railroad Company, defendant.	

The plaintiff, the St. Louis Insurance Company, a corporation under and by virtue of the laws of the State of Missouri, complains of the defendant, the St. Louis, Vandalia, Terre Haute & Indianapolis Railroad Company, a corporation incorporated under the laws of the State of Indiana and Illinois, or one of them, by the name of the Terre Haute and Indianapolis Railroad Company, but commonly known under the name by which it is herein sued, and under said name owning or operating a railroad terminating opposite the city of St. Louis and the State of Missouri.

That heretofore, to wit, on the 1st day of January, 1873, and throughout said year, the defendant and the Pittsburgh, Cincinnati & St. Louis Railroad Company, a corporation under the laws of the States of Ohio and Indiana, the Atlantic and Great Western Railway Company, a corporation under the laws of the States of Ohio and Pennsylvania, and the Erie Railway Company, a corporation under the laws of the States of New York, Pennsylvania, and New Jersey, jointly formed and constituted a continuous and connected line of common carriers by and over the railroads of the several railroad and railway companies aforesaid, between divers places, and amongst others between the said city of St. Louis and a certain dock located in Jersey City in the State of

New Jersey, and known as the White Star Dock, or Dock of the White Star line, and as such line of common carriers they jointly carried on the business of transporting goods and merchandize for hire between said city of St. Louis and said White Star Dock, as well as between sundry other localities, they jointly charging and receiving for 23, 24 such transportation certain freight or hire which they divided among themselves in proportions mutually understood and agreed to by and between themselves, but to plaintiff unknown. That on or about the 20th day of January, 1873, the firm of Adolphus Meier & Co. of St. Louis aforesaid, and the firm of C. G. Meier & Co., of London, England, being joint owners of 567 bales of compressed cotton marked V. I. G., then at St. Louis aforesaid, of great value, to wit, one hundred thousand dollars, there delivered the same to said line of common carriers to be carried and transported by said line from St. Louis aforesaid to said White Star dock, and there delivered to a certain corporation or association of persons (plaintiff is not informed which) called The Oceanic Steam Navigation Company, but generally known under the name of "The White Star Line," and being common carriers by certain ocean vessels between said White Star dock and the city of Liverpool, in England; and said line of railway common carriers then and there accepted and received said cotton, and agreed for certain reasonable hire and reward in that behalf, then and there agreed by said firms to be paid to them to carry and transport the same to said White Star dock, and then deliver the same as aforesaid, said White Star Line at the same time agreeing to accept the same at said dock and transport the same to Liverpool aforesaid, for certain reasonable hire agreed to be paid them therefor by said firms. And thereupon it became the duty of said connected line of railway carriers, and of each and every member thereof, whilst their said line had said cotton in their possession, to take due and proper care thereof, and within a reasonable time, and without unusual or unnecessary delay, to carry and transport the same from St. Louis aforesaid to said White Star dock, and there deliver the same to said White Star Line, yet said connected line of railway carriers, and each and every member thereof, not regarding their duty in that behalf, 25, 26 did not, nor would, within a reasonable or proper time, carry or transport said cotton from St. Louis aforesaid to said White Star dock, but proceeded negligently, carelessly, and with great, unusual, and unnecessary delays to carry and transport the same, and did not, nor would, whilst they had said cotton in their possession, take due or proper care thereof, but wholly neglected and failed so to do, and so negligently and dilatorily carried the same, and took such bad care thereof, that afterwards, and whilst said cotton was in their possession and in transit between said city of St. Louis and said White Star dock, to wit, on the 21st March, 1873, a large part of said cotton, to wit, 132 bales thereof, of great value, to wit, fifty thousand dollars, was wholly destroyed and lost to said Adolphus Meier & Co. and C. G. Meier & Co., and never delivered at said White Star dock or elsewhere. And plaintiff avers that said 132 bales had been by said owners thereof theretofore sold, to arrive in Liverpool, at a great price, to wit, ten thousand pounds English gold currency, and by reason of said destruction and non-delivery thereof, said owners lost said sale, and said price thereof, and suffered damage in a large sum of money, to wit, fifty thousand dollars.

And afterwards, to wit, on the 1st day of March, 1873, said damages being wholly unpaid, said owners, Adolphus Meier & Co. and C. G. Meier & Co., for value, assigned in writing and transferred to plaintiff

all their said damages and all claims and right of action thereof, of which defendant had due notice; yet defendant, nor said line of railway carriers, nor either of them, has, although often requested, paid to plaintiff said damages or any part thereof.

2. And for a second cause of action, plain tiff states that on or about the 18th day of Feb'y, 1873, the said firms of Adolphus Meier & Co. and C. G. Meier & Co., being joint owners of 1,047 other bales of compressed cotton, P. I. G., then at St. Louis aforesaid, of great value, to wit, two hundred thousand dollars, there delivered the same to said connected line of

27, 28 railway carriers, to be by said line carried and transported from St. Louis aforesaid to said White Star dock, and there delivered to said White Star Line, and said connected railway line then and there accepted and received said cotton, and agreed for certain reasonable hire and reward in that behalf agreed to be paid to them by said firms to carry and transport the same from St. Louis aforesaid to said dock, and there deliver the same to said White Star Line, said White Star Line at the same time agreeing to accept said cotton at said dock and transport the same thence to Liverpool aforesaid, for certain reasonable hire in that behalf to be paid to them by said firms, and thereupon it became the duty of said connected line of railway carriers, and each and every member thereof, whilst their said line had said cotton in their possession, to take due and proper care thereof, and within a reasonable proper time, and without unusual or unnecessary delay, to carry and transport the same from St. Louis aforesaid to said White Star dock, and there deliver the same to said White Star Line, yet said connected line of railway carriers, and each member thereof, not regarding their duty in that behalf, did not, nor would, within a reasonable or proper time, carry or transport said cotton from St. Louis aforesaid to said White Star dock, but proceeded negligently, carelessly, and with great, unusual, and unnecessary delays to carry and transport the same; and did not, nor would, whilst they had said cotton in their possession, take due or proper care thereof, but wholly neglected and failed so to do, and so negligently and dilatorily carried the same and took such bad care thereof, that afterwards, and whilst said cotton was so in their possession, and in transit between said city of St. Louis and said White Star dock, to wit, on 21st day of March, 1873, a large part of said cotton, to wit, 589 bales thereof, of great value, to wit, one hundred thousand dollars, was wholly destroyed and lost to said Adolphus Meier & Co. and C. G. Meier & Co., and never delivered at said White Star dock or elsewhere.

And plaintiff avers that said 564 bales had been by said owners thereof theretofore "sold to arrive" in Liverpool at a great price, to wit, twenty-five thousand pounds English gold currency, and by reason of said destruction and non-delivery thereof, said owners lost said sale and said price thereof, and suffered damage in a large sum of money, to wit, one hundred thousand dollars.

And afterwards, to wit, on the 1st day of March, 1875, said damages being wholly unpaid, said owners, Adolphus Meier & Co. and C. G. Meier & Co., for value, assigned in writing and transferred to plaintiff all their said damages, and all claim and right of action therefor, of which defendant had due notice; yet neither defendant nor said line of railway carriers, nor either of them has, although often requested, paid the plaintiff said damages or any part thereof. Wherefore plaintiff prays judgment for one hundred and fifty thousand dollars, the aggregate of its damages aforesaid, with interest and costs.

JNO. G. CHANDLER,

Att'y for Plaintiff.

And afterwards, on the 22d day of January, 1877, the defendant filed its answer to the amended petition herein, which answer is in the words and figures following, to wit:

Answer to am'd petition.

In the circuit court of the United States, eastern district of Missouri.

THE ST. LOUIS INSURANCE COMPANY

vs.

THE TERRE HAUTE AND INDIANAPOLIS RAIL-
road Company, impleaded under the name of
the St. Louis, Vandalia, Terre Haute and
Indianapolis Railroad Company.

31, 32 Now this day comes the said The Terre Haute and Indianapolis Railroad Company, and for answer to both counts of the amended petition of plaintiff herein, admits that it is a corporation as charged. Defendant denies that at the time mentioned in plaintiff's petition, or at any other time, defendant and the other railroad companies mentioned in said petition jointly formed and constituted a continuous and connected line of common carriers by and over the railroads of the several companies, or that they or any of them were engaged as a continuous line of carriers in carrying or transporting goods and merchandise between the points named, or any other points; denies that they jointly charged and received for any transportation, freight, or hire which they divided among themselves in any proportion whatever as a continuous line, or that any such division was agreed to by and between said roads and companies.

Defendant denies that said Adolphus Meier & Co. and C. G. Meier & Co., or either of said firms, delivered any cotton whatever to defendant, or to any line of carriers of which defendant was a part, to be transported as alleged, or to be delivered as alleged; denies that any such line accepted and received such cotton, or agreed for any hire or reward whatever to transport said cotton, or to deliver it as alleged.

Defendant has no knowledge nor any information thereof sufficient to form a belief whether any such line of steamers as the White Star Line existed, or any such company as the Oceanic Steam Navigation Company, as alleged; or whether said company, if any such existed, agreed to accept said cotton, or to transport it to Liverpool, as alleged.

Defendant denies that it became the duty of any line of carriers of which defendant formed a part, or that it ever became the duty of defendant to take any care whatever of said cotton, or to carry and transport the same as alleged, or to deliver the same to said White Star dock, or to said White Star Line; denies that it negligently, carelessly, with great or unusual delay carried the same.

33, 34 Defendant has no knowledge, nor any information thereof, sufficient to form a belief, whether on the 21st day of March, 1873, or on any other day, any part of the cotton mentioned in plaintiff's petition was destroyed or lost as alleged; or what was the value of the cotton mentioned in plaintiff's petition, or of that part of it alleged to have been lost and destroyed; or whether any part thereof had been sold to arrive in Liverpool as alleged, or for the price alleged; or whether said owners lost said sale and price, or whether they were damaged in any sum whatever. But defendant avers that if any such loss occurred to

said owners as alleged, it was not from any act, negligence, default, or omission on the part of the defendant, and that it is not liable therefor.

Defendant has no knowledge nor any information sufficient to form a belief whether said Meiers assigned and transferred to plaintiff any alleged damages, or claim or right of action therefor, but denies that they had any right of action against defendant for any such damages, or that they could make the alleged assignment.

Defendant denies that plaintiff or its said alleged assignors have suffered any damage whatever, or that it is entitled to judgment against defendant in the sum of one hundred and fifty thousand dollars, or any other sum.

And for further answer and defence to said causes of action set forth in the first and second counts of plaintiff's petition, defendant says that at the time mentioned in plaintiff's petition there existed an association of persons, or an incorporated company, defendant is ignorant which, during business under the name of the Erie and Pacific Despatch; that said Adolphus Meier & Co. entered into an agreement with the said Erie and Pacific Despatch, whereby said Erie and Pacific Despatch agreed to receive from said Adolphus Meier & Co., and transport from Saint Louis to Liverpool, the cotton mentioned in said two counts of plaintiff's petition, and to deliver at Liverpool, to the order of 35, 36 C. G. Meier & Co. or their assigns, said C. G. Meier & Co. to pay the freight upon the delivery to them of said cotton; that the agreement so entered into between said Adolphus Meier & Co. and said Erie and Pacific Despatch contained among others the following stipulations and covenants, to wit:

"That the said Erie and Pacific Despatch and its connections which receive said property shall not be liable * * * * * for loss or damage by wet, dirt, fire, or loss of weight, or for conditions of baling on hay, hemp, or cotton; * * * nor for loss or damage on any article or property whatever, by fire or other casualty, while in transit or while in deposit or places of transshipment, or at depots, or at landings at all points of delivery; nor for loss or damage by fire, collision, or the dangers of navigation while on seas, rivers, lakes, or canals. All goods or property under this bill of lading will be subject, at its owner's cost, to necessary cooperage or baling, and is to be transported to the depots of the companies, or landings of the steamboats or forwarding lines, at the points receipted to for delivery.

"It is further stipulated and agreed that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

"And it is further agreed that the amount of the loss or damage so accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of the said goods or property at the place and time of shipment under this bill of lading."

37, 38 And defendant says that said Erie and Pacific Despatch delivered to this defendant certain cotton to be by defendant carried and transported from East St. Louis, in the State of Illinois, to Indianapolis, in the State of Indiana, and no further, which said cotton is the same cotton delivered by said Adolphus Meier & Co. to the said Erie and Pacific Despatch as aforesaid.

And afterwards, on the 22d day of January, 1877, the defendant filed its answer to the amended petition herein, which answer is in the words and figures following, to wit:

Answer to am'd petition.

In the circuit court of the United States, eastern district of Missouri.

THE ST. LOUIS INSURANCE COMPANY

vs.

THE TERRE HAUTE AND INDIANAPOLIS RAIL-
road Company, impleaded under the name of
the St. Louis, Vandalia, Terre Haute and
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31, 32 Now this day comes the said The Terre Haute and Indianapolis Railroad Company, and for answer to both counts of the amended petition of plaintiff herein, admits that it is a corporation as charged. Defendant denies that at the time mentioned in plaintiff's petition, or at any other time, defendant and the other railroad companies mentioned in said petition jointly formed and constituted a continuous and connected line of common carriers by and over the railroads of the several companies, or that they or any of them were engaged as a continuous line of carriers in carrying or transporting goods and merchandise between the points named, or any other points; denies that they jointly charged and received for any transportation, freight, or hire which they divided among themselves in any proportion whatever as a continuous line, or that any such division was agreed to by and between said roads and companies.

Defendant denies that said Adolphus Meier & Co. and C. G. Meier & Co., or either of said firms, delivered any cotton whatever to defendant, or to any line of carriers of which defendant was a part, to be transported as alleged, or to be delivered as alleged; denies that any such line accepted and received such cotton, or agreed for any hire or reward whatever to transport said cotton, or to deliver it as alleged.

Defendant has no knowledge nor any information thereof sufficient to form a belief whether any such line of steamers as the White Star Line existed, or any such company as the Oceanic Steam Navigation Company, as alleged; or whether said company, if any such existed, agreed to accept said cotton, or to transport it to Liverpool, as alleged.

Defendant denies that it became the duty of any line of carriers of which defendant formed a part, or that it ever became the duty of defendant to take any care whatever of said cotton, or to carry and transport the same as alleged, or to deliver the same to said White Star dock, or to said White Star Line; denies that it negligently, carelessly, with great or unusual delay carried the same.

33, 34 Defendant has no knowledge, nor any information thereof, sufficient to form a belief, whether on the 21st day of March, 1873, or on any other day, any part of the cotton mentioned in plaintiff's petition was destroyed or lost as alleged; or what was the value of the cotton mentioned in plaintiff's petition, or of that part of it alleged to have been lost and destroyed; or whether any part thereof had been sold to arrive in Liverpool as alleged, or for the price alleged; or whether said owners lost said sale and price, or whether they were damaged in any sum whatever. But defendant avers that if any such loss occurred to

said owners as alleged, it was not from any act, negligence, default, or omission on the part of the defendant, and that it is not liable therefor.

Defendant has no knowledge nor any information sufficient to form a belief whether said Meiers assigned and transferred to plaintiff any alleged damages, or claim or right of action therefor, but denies that they had any right of action against defendant for any such damages, or that they could make the alleged assignment.

Defendant denies that plaintiff or its said alleged assignors have suffered any damage whatever, or that it is entitled to judgment against defendant in the sum of one hundred and fifty thousand dollars, or any other sum.

And for further answer and defence to said causes of action set forth in the first and second counts of plaintiff's petition, defendant says that at the time mentioned in plaintiff's petition there existed an association of persons, or an incorporated company, defendant is ignorant which, during business under the name of the Erie and Pacific Despatch; that said Adolphus Meier & Co. entered into an agreement with the said Erie and Pacific Despatch, whereby said Erie and Pacific Despatch agreed to receive from said Adolphus Meier & Co., and transport from Saint Louis to Liverpool, the cotton mentioned in said two counts of plaintiff's petition, and to deliver at Liverpool, to the order of 35, 36 C. G. Meier & Co. or their assigns, said C. G. Meier & Co. to pay the freight upon the delivery to them of said cotton; that the agreement so entered into between said Adolphus Meier & Co. and said Erie and Pacific Despatch contained among others the following stipulations and covenants, to wit:

"That the said Erie and Pacific Despatch and its connections which receive said property shall not be liable * * * * * for loss or damage by wet, dirt, fire, or loss of weight, or for conditions of baling on lay, hemp, or cotton; * * * nor for loss or damage on any article or property whatever, by fire or other casualty, while in transit or while in deposit or places of transshipment, or at depots, or at landings at all points of delivery; nor for loss or damage by fire, collision, or the dangers of navigation while on seas, rivers, lakes, or canals. All goods or property under this bill of lading will be subject, at its owner's cost, to necessary cooperage or baling, and is to be transported to the depots of the companies, or landings of the steamboats or forwarding lines, at the points received to for delivery.

"It is further stipulated and agreed that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

"And it is further agreed that the amount of the loss or damage so accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of the said goods or property at the place and time of shipment under this bill of lading."

37, 38 And defendant says that said Erie and Pacific Despatch delivered to this defendant certain cotton to be by defendant carried and transported from East St. Louis, in the State of Illinois, to Indianapolis, in the State of Indiana, and no further, which said cotton is the same cotton delivered by said Adolphus Meier & Co. to the said Erie and Pacific Despatch as aforesaid.

Defendant says, that under its contract with said Erie and Pacific Despatch it agreed and became liable only to carry said cotton safely to Indianapolis, and there to deliver it to the next succeeding line. Defendant says that it did carry said cotton safely to Indianapolis, and did there deliver it to the next succeeding carrier, and that while said cotton was in its possession and care, it was not damaged in any manner whatever, and no part of it was lost.

Defendant says that said cotton, if damaged at all, or if any part thereof was lost or destroyed, was so lost, damaged and destroyed long after it had passed out of defendant's hands, and long after defendant's responsibility therefor had terminated. And having fully answered, defendant asks to go hence without day.

EVERETT W. PATTISON.

Att'y for Def't.

And afterwards, on the 21st day of March, 1877, the plaintiff filed its reply to said answer, which is in words and figures as follows, to wit:

Reply.

In the circuit court of the United States for the eastern district of Missouri. March term, 1877.

THE ST. LOUIS INSURANCE COMPANY	}
<i>vs.</i>	
THE TERRE HAUTE & INDIANAPOLIS RAILROAD Company.	

And now comes the plaintiff and for reply to defendant's answer says it denies each and every allegation of new matter in said answer contained.

JOHN G. CHANDLER,

Att'y for Plaintiff.

39, 40 And afterwards, at the March term, 1878, of said court, and on the 19th day of March, 1878, the following proceedings were had in said cause, to wit:

THE ST. LOUIS INSURANCE Co, PLAINTIFF,	}
<i>vs.</i>	
THE TERRE HAUTE & INDIANAPOLIS RAILROAD Company, defendant.	

This case having come on to be heard before the court, a jury having been waived by stipulation in writing duly filed, and the testimony being heard, and the arguments of counsel thereon, the court doth specially find the following facts:

Special finding.

During the year 1873, the defendant, under the name of the St. Louis, Vandalia, Terre Haute & Indianapolis Railroad, sometime also called the Vandalia Line, owned and operated a line of railroad from East St. Louis, Illinois, to Indianapolis, Indiana; the Pittsburgh, Cincinnati & St. Louis Railroad Company owned and operated a line of railroad from Indianapolis to Urbana, Ohio, and other places; the Atlantic & Great

Western Railway Company owned and operated a line of railroad from Urbana to Salamanca, New York, and to and from other places; and the Erie Railway Company owned and operated a line of railroad from Salamanca to Jersey City, on New York Harbor, opposite the city of New York. These several railroads were common carriers of goods. The Erie Railway Company, by means of barges and steam-tugs which it owned or employed, carried goods from its depot or warehouse at Long Dock, Jersey City, to its depot, or to any warehouse in New York City, and to the docks of the various steamer lines in Jersey City, and New York City in New York harbor. Goods consigned to a warehouse in New York City on "free delivery" were called "inspection freights." For the delivery of "inspection freights" and goods to the steamers, the Erie Railway Company employed the New Jersey Lighterage Company, a corporation whose business was to lighter goods in New York harbor, upon through shipments from East St. Louis to Jersey City by the aforesaid railroads, reshipment of the goods was necessary at Urbana, where the Pittsburgh, Cincinnati & St. Louis Railroad intersected with the Atlantic & Great Western Railway, the gauge of the latter and of the Erie Railway, though the same with each other, differing from that of the Pittsburgh, Cincinnati & St. Louis Railroad and that of defendant's road, but shipments through to New York might be by other routes, and if no specific through route was designated, any one of other routes might be pursued. There was at St. Louis, Mo., a corporation known as the Transfer Company, whose business was to haul goods from St. Louis to the various railroad depots in East St. Louis, including defendants. The Oceanic Steam Navigation Company, usually known as the "White Star Line," was a corporation owning sundry ocean steamers, and was a common carrier between New York and Liverpool, England, receiving and delivering goods at their dock in Jersey City, distant 723 feet from the Erie Railway Long Dock. The Erie & Pacific Despatch was a Kansas corporation called a fast freight line, whose business was to solicit and forward freights.

There were several trunk lines of railroad between St. Louis and New York, including the one above particularly described, and also one composed of defendant's road, and the Pittsburgh, Cincinnati & St. Louis Railroad, and the Pennsylvania Railroad. By this latter line the defendant made its through shipments to New York, in the absence of special contract or instructions from the shippers otherwise requiring. The several railroads constituting the various trunk lines between St. Louis and New York, had an arrangement between themselves in 1873, and for seven or eight years before, whereby the general freight agents of the roads terminating at St. Louis, made what was called a joint tariff to New York, fixing through rates, which were divided among the several roads constituting a through line. According to an estimate of distances the goods were to be carried by each road, upon the 43, 44 basis of the shortest line. Losses occurring on through shipments, if not located, were prorated as between the roads themselves, in the same ratio as the freight moneys, but if located, were, as between the roads, to be paid by the road on which they occurred.

These trunk lines made and published on the 21st day of October, 1872, such a joint tariff, the defendant acting by its general freight agent, H. W. Hibbard. The title page thereof is as follows:

Joint rates of transportation from Saint Louis, via Toledo, Wabash & Western; Ohio & Mississippi; Chicago & St. Louis; St. Louis, Vandalia, Terre Haute & Indianapolis; Indianapolis & St. Louis; St. Louis & Southeastern, and St. Louis, Belleville & Southern Illinois Railroads.

• Taking effect at Saint Louis, Monday, Oct. 21st, 1872.

John B. Carson, general freight agent, T. W. & W. R. R.

Wm. Duncan, " " " O. & M. R'y.

James Smith, " " " Chi. & St. L. R. R.

H. W. Hibbard, " " " Vandalia Line.

John C. Noyes, " " " I. & St. L. R. R.

John W. Mass, " " " St. L. & S., E. R. R.

H. L. De Rew, " " " St. L., B. & S. I. R. R.

C. E. CANDEE.

General Agent, Toledo, Wabash and Western R'rs.

S. W. Cor. Main and Olive Streets, St. Louis, Mo.

By this tariff, which continued in force till after the loss complained of in this case, the "all rail rates in cents per hundred pounds on compressed cotton from St. Louis and Belleville to New York," were fixed at 90 cents. There was a memorandum in this tariff that the rates named were subject to change at any time. The joint tariffs were put into the hands of the agents of the railroads for their guidance in making contracts, and were also distributed to shippers and the public generally.

There were arrangements effected between the Erie & Pacific Despatch and sundry railroads having connections terminating in 45, 46 New York, under which the Despatch was empowered to contract for the transportation of goods according to the tariff rates, or any special rates furnished by the respective railroads; the roads agreeing to carry the goods so contracted for to their proper destination. The Erie & Pacific Despatch agreed with the railroads to establish offices and agencies at various points on the lines of railroad, and among others at St. Louis and New York City, and did establish such offices and agencies. The Erie & Pacific Despatch was to solicit and secure business, and to take care of it that other competing lines could not get it away; and all lines running into New York other than those with which the Erie & Pacific Despatch had an arrangement, were competing lines. The Despatch could make no contract or fix any rate for the carriage of goods over defendant's road except as authorized by defendant. The Despatch had such agreements with the four railroads named in the amended petition, including defendant; and a large amount of business was done over this line and defendant's road thereunder.

On the arrival of Erie & Pacific Despatch shipments at Indianapolis, they were sometimes sent forward by defendant, as the Despatch Co. ordered, over the Pittsburgh, Cincinnati & St. Louis Railroad, and sometimes by what is known as the Indianapolis & Junction Road, to the intersection of the Atlantic & Great Western Railway, and thence by the latter and the Erie Railway to New York.

The Erie & Pacific Despatch had a separate agreement with each of the railroads constituting the through line, in some instances oral and in others in writing; the former being the case with defendant's contract, the latter with that of the Erie Railway. In all cases when a through rate was contracted for, the several railroads of the connecting line participated therein according to the aforesaid arrangement for prorating through freights with each other. The railroads collected the 47, 48 freight from the consignees, divided it among themselves, and

paid to the Erie & Pacific Despatch for its services so much per cent. on the gross freights for "pound freight," and 60 cents a bale on cotton, each road settling separately with the Despatch for its dues.

The written contract between the Erie Railway, and the Erie & Pacific Despatch was as follows:

This agreement entered into this first day of April, one thousand eight hundred and seventy two, between the Erie Railway Company, party of the first part, and The Erie & Pacific Despatch Company, party of the second part, witnesseth:

First. For and in consideration of one dollar in hand paid, the receipt of which is hereby acknowledged, the party of the first part hereby agrees to transport all through freight secured by the Erie & Pacific Despatch Company, either eastward or westward bound, passing between Philadelphia, Pa., New York City, Jersey City, Albany, N. Y., Boston, Mass., and common or competing points in New England, and common or competing points on the line of the said Erie Railway; except that on east bound freight they shall receive no commission on shipments from any station on the line of the railway of the party of the first part.

Second. The party of the second part shall issue its own bills of lading to shippers, subject as to rates to the current through rates of the party of the first part, which rates shall at all times be as low as the rates furnished to any other party or parties.

Third. The party of the second part shall establish and maintain, at its own expense, independent and efficient agencies for soliciting and procuring freight, in the cities of New York and Boston, and other cities in the east or west, as may be deemed necessary by the parties hereto.

Fourth. The party of the first part agree to receive, load and unload, deliver and way bill, and furnish daily an impression copy of each 49, 50 and every way bill of both eastward and westward bound freight, free of charge, to the party of the second part.

The party of the first part further agrees to assume all the risks of common carriers, and to pay all damages to or loss of property while on their line of road or in their possession; and in case property is lost or damaged, and the loss and damage cannot be definitely located, the party of the first part agrees to pay said loss, in proportion to what was received for transporting the same, subject, however, to the liability limitation contained in the "bills of lading" of the parties of the first part.

Fifth. The party of the first part agrees to transport all freight known as first class freight, on the fastest freight trains running over its road, and to run the same and all other through freight trains, as to enable the party of the second part to deliver freight between competing points in the east or west, as quickly as it is done by any other competing line or road.

Sixth. The party of the first part further agrees to furnish passes over its line of road for the officers and agents of the party of the second part, traveling on the business of said party of the second part, on regular application from their superintendent.

Seventh. The party of the second part agrees to maintain the authorized rates of the party of the first part, and to be governed in the transportation of through business by any obligation entered into by the party of the first part with their competing lines for the maintenance of rates.

Eighth. It is further agreed, that in consideration of the mutual benefits to be derived by the parties hereto, the party of the first

part agrees to pay the said party of the second part a commission on west bound freight, of fifteen per cent. of their gross earnings, as per their way bills, on first, second and third class freight, and ten per cent. on their gross earnings, as per their way bills, on fourth and special class freight from Philadelphia, Pa., New York, Jersey City, Albany, N. Y., Boston, Mass., and competing points in New

England, to Corry, Pa., Union, Pa., Oil City, Pa., Greenville, Pa., 51, 52 Shenango, Pa., Cleveland, O., Youngstown, O., Sharon, Pa., Niles, O., Ravenna, O., Akron, O., Mansfield, O., Galion, O., Marion, O., Urbana, O., Dayton, O., Hamilton, O., Cincinnati, O., Chicago, Ill., Louisville, Ky., St. Louis, Mo.

On east bound freight, the party of the first part agrees to pay the party of the second part a commission of ten per cent. of their earnings (gross), as per their way bills, on first, second and third class freight, and eight per cent. of their gross earnings, as per their way bills, on fourth class freight from Cleveland, O., Chicago, Ill., Louisville, Ky., St. Louis, Mo., and on freight from Mansfield, O., Galion, O., Urbana, O., Dayton, O., Hamilton, O., or other competing points on the Atlantic and Great Western Railroad, providing such freight originated from points off of said line, it being understood that no commission is to be paid on freight originating at such stations; and the commission on west bound freight shall be paid on or before the fifteenth of each month.

Ninth. The party of the first part further agrees to give the party of the second part, at all times, as low rates as are given to any other line running over the road of the party of the first part, and that they will prorate any rate on east bound freight made by authority of the road leading from the point, provided said road is duly authorized to make through rates over the road of the parties of the first part, and that they will prorate all losses, damages and rebates that are prorated with any other line running over the Erie Railway.

Tenth. This contract to continue in full force and effect for five years from the first day of April, one thousand eight hundred and seventy-two, but may be terminated by either party after two years, by a notice in writing, in ninety days from the date of said notice.

In witness whereof, the party of the first part has hereto set its corporate seal and caused these presents to be duly signed by its vice-53, 54 president, and the said party of the second part have caused the same to be duly executed the day and year first above written.

[SEAL OF ERIE
RAILWAY COMPANY.]

ERIE RAILWAY Co.,
By A. S. DIVEN,
Vice-Pres't.
ERIE & PACIFIC DESPATCH,
By SAM. DE BOW,
Gen'l Manager.

The agreement between the defendant company and the said Despatch, though oral, was in substance the same as the aforesaid agreement with the Erie Railway Company.

On all shipments from St. Louis to New York by the line composed of the four roads mentioned in the petition, the defendant paid the transfer charges from St. Louis to East St. Louis, and the Erie Railway paid the lighterage, whether the goods were to go to New York proper or were foreign-bound; and these transfer and lighterage charges were included in the through rate named by defendant. On all shipments from New York to St. Louis by this line, the defendant collected the freight money from the consignees, and, retaining its proportion, "

counted for the residue to the next road in the line, which, in like manner, deducted its share and accounted in the same way to the next, and so on, to the beginning of the line. On shipments from St. Louis to New York City proper, the Erie Railway collected the freights from the consignees, and in like manner settled with the next preceding carrier, and so on, in the inverse order of the transportation, to the first carrier. These settlements between the roads were made periodically, upon accountings between them.

The Erie & Pacific Despatch had an arrangement or agreement with the White Star Line by which the Despatch could contract for shipments from New York to Liverpool at rates given by the steamer line, the latter agreeing to receive the goods at their dock in Jersey City, and to transport them to Liverpool; but the Despatch had no power to bind the steamer line for any risks incurred in the inland transportation. The White Star Line paid the Despatch no commission or other compensation. Their remuneration was obtained exclusively from the railroads, under the arrangements above set forth. On through shipments from St. Louis to Liverpool, the Despatch contracted for a through rate in this way: They applied to H. W. Hibbard, defendant's general freight agent, for the inland rate—that is, the all-rail rate—including lighterage and transfer charges as aforesaid; or they took it from the published tariff, though the agents of the fast-freight lines, of which the Despatch was one, were in the habit of applying to Mr. Hibbard for special rates. The inland rate furnished by defendant was added to the ocean rate given by the White Star Line, and this sum constituted the through rate to Liverpool at which the Despatch contracted with the shipper. In no case did the Despatch charge any greater through freight than the sum of the ocean and inland rates thus furnished.

On the arrival at Jersey City of goods bound to Liverpool under Erie & Pacific Despatch bills of lading, or marked or way-billed as Erie & Pacific Despatch shipments, the usual course of business was this: Notices of the arrival of the goods were made out and signed by the Erie Railway agent, the same in form given to ordinary consignees, giving information to the Erie & Pacific Despatch Company of the arrival of the goods, the amount of freight and charges, and that a failure to remove the goods in a reasonable time would be construed as an assent to the company's storing them in a suitable public store or warehouse at the owner's expense and risk, subject, however, to the lien of the company for its transportation and removal charges, and subject to storage charges, and further requiring all checks to be made payable to the order of the Erie Railway Company, and stating that if the consignee should, within twenty-four hours after receipt of the notice, inform the Erie Railway alongside of what vessel he desired the freight delivered, the company would make the delivery; and if such notice should not be given within twenty-four hours, the freight would be warehoused at the risk and expense of the owner. The following is the form of notice:

ERIE RAILWAY COMPANY.

Special notice.

A failure to receive and remove the property mentioned below promptly will be regarded as showing an intention to allow the company to store

the property in any suitable public store or warehouse at the expense of the owners, there to remain, uninsured, at the risk of the owner or claimant, subject, however, to the lien of this company for its transportation and removal charges, and subject to storage charges.

Terms, cash on delivery.

From , 187 .

COLLECTOR'S OFFICE,
Jersey City, , 187 .

W. B. (i. e., way-bill.)

Car

M. (i. e., to fill in with consignee.)

Care,

The following freight, consigned to your address, now ready for delivery at , (i. e., blank left to be filled in with a. m. or p. m., according to circumstances.)

Hhds.
Barrels.
Packages.
Boxes.
Bales.

Rolls.
Sides.
Tierces.
Bags.
Bundles.

Amount of freight and charges, \$.

R. S. HAIGHT.

Return this notice to collector's office at Jersey City, and get receipted bill.

There was printed across the face the following: "All checks must be made payable to the order of the Erie Railway Company."

5), 60 Then, in red print, the following:

"If any consignee shall, within twenty-four hours after the receipt of this notice, notify the Erie Railway Company, at the collector's office, Jersey City, alongside what vessel he desires this freight delivered, the company will make the delivery.

"If such notice shall not be given within the twenty four hours, the freight will be warehoused at the risk and expense of the owner."

The notices were delivered to the agent of the New Jersey Lighterage Company, which had its office in the east-bound freight-house of the Erie Railway, on Long Dock in Jersey City, and were by him put into a drawer set apart for them, and an agent of the Erie & Pacific Despatch called daily at this office and took the drawer and went with them to the office of the White Star Line in New York City, and obtained a permit to load the goods upon some vessel of the line, which he returned to the lighterage company. The agent of the latter prepared, from the way-bills of the Erie Railway Company, receipts to be signed by the steamer's officer therefor, the lighterage company's agent acting throughout under the direction of the Jersey City agent of the Erie Railway. The employees of the Erie Railway then loaded the goods upon the lighters, which the lighterage company then towed to

the steamer dock and there delivered the goods. It was the practice of the Erie Railway to deliver all ocean freights to the vessels. The Erie & Pacific Despatch neither owned nor controlled any means of conveyance from the railway dock to the steamer dock.

When the goods had been delivered to and receipted for by the White Star Line, the Erie & Pacific Despatch collected from the White Star Line the full amount of the inland freight in accordance with the notice and freight-bill of the Erie Railway received from the lighterage company, and returned to the latter the notice, with a check drawn by Sam.

De Bow as president of the Erie & Pacific Despatch, payable to 61, 62 the order of the Erie Railway Co., covering the full amount of the freight-bill, with no deduction for commission or anything else. The commission-account of the Erie & Pacific Despatch, as well as that of the lighterage co., with the Erie Railway, was settled monthly. The lighterage co. delivered the check to the Erie Railway.

About January 20th and February 18th, 1873, Adolphus Meier & Co., of St. Louis, Missouri, made two agreements with the Erie & Pacific Despatch for the shipment of two lots of cotton from St. Louis to Liverpool, England. These agreements were made in St. Louis, and were to the effect that the cotton was to be transported to Liverpool for a through rate, expressed in English money, nothing being said as to what route the cotton should take from St. Louis to the seaboard; that at the time the agreements were respectively made, Meier & Co. either delivered to the agent of the Erie & Pacific Despatch the receipts of the warehouse in St. Louis where the cotton was stored, commonly called "cotton notes," or gave an order for the cotton to such agent; that on January 22, 1873, the Erie & Pacific Despatch gave an order to the St. Louis Transfer Co. for 567 bales of the said cotton, marked V. I. C., and this lot the Transfer Co. took in their wagons across the Mississippi River to the city of East St. Louis, and there delivered it to the defendant on account of the Erie & Pacific Despatch, on the days and in the amounts as hereinafter stated.

The said Transfer Co. gave to the Erie and Pacific Despatch receipts for said two lots of cotton, and defendant receipted therefor to said Transfer Co., and by the dray tickets of said Transfer Co. said cotton was consigned by the Erie & Pacific Despatch to C. G. Meier & Co., London.

In about the usual time after the last of the V. I. C. cotton had been received by the Erie & (Pacific) Despatch, the firm of Adolphus Meier & Co. received of the said Despatch Co. a bill of lading for said V. I. C. cotton, in the words and figures hereinafter set forth.

When freight was shipped over defendant's line by the Erie and Pacific Despatch from St. Louis, the defendant never issued bills of lading; that defendant only billed the freight to Indianapolis, and 63, 64 only collected and received pay for carrying the freight over its own line; that at Indianapolis it delivered the freight for farther transportation to such other road as the Erie & Pacific Despatch would then and there direct.

When, on or about the said 20th day of January, in the case of the V. I. C. lot, and about the 18th day of February, in the case of the P. I. G. lot, Theodore Meier, of the firm of Adolphus Meier & Co., acting for said two firms, applied to the agent of the Erie & Pacific Despatch. at St. Louis, for a through rate to Liverpool on the cotton, the agent telegraphed to the White Star Line at New York for the ocean rate, added that to the inland rate, and gave Mr. Meier the through rate. In each case the only conversation was as to the through rate expressed

in English money. There was nothing said about any exceptions or reservations respecting the liability of the carrier or the routes to New York. Thereupon Mr. Meier delivered, as before stated, to the agent of the Erie & Pacific Despatch the warehouse receipts commonly called "cotton notes," each representing one bale of cotton. At the time the rates were agreed upon and the cotton notes delivered, the owners of the cotton had no knowledge of the arrangements between the railroads, and between the Despatch and the railroads, as above set forth. Mr. Meier only knew that the cotton was to go to New York and thence, by the White Star Line, to Liverpool. The agent of the Erie & Pacific Despatch delivered to the Transfer Company the notes for the V. I. C. cotton on or before Jan. 22, 1873, and those of the P. I. G. cotton on or before Feb. 19, 1873. The cotton was then taken by the Transfer Company from the warehouse, hauled to East St. Louis, and there delivered at defendant's depot. It was there way-billed and loaded upon its cars by defendant, and sent forward from East St. Louis on defendant's road to Indianapolis (defendant's way-bill being only to Indianapolis), and thence, without change of cars to Urbana, where it was put into other cars suitable to the change of gauge, and proceeded over the 65, 66 Atlantic & Great Western and Erie Railways to Jersey City.

The consignee named, and the only one named, in the way-bills of defendant or those of the Erie Railway, was C. G. Meier & Co., London, and in no case the Erie & Pacific Despatch. The V. I. C. cotton was delivered at defendant's depot on the 27th, 28th, and 29th days of January, 1873, in lots of 112, 260, and 195 bales respectively, and was sent forward from there as follows: Jan. 29th, 390 bales; Jan. 30th, 92 bales, and Jan. 31st, 66 bales; Feb'y 1st, 19 bales. The P. I. G. cotton was delivered at defendant's depot on the 19th, 20th, 21st, 22d, 23rd, and 24th days of February, 1873, in lots of 291, 257, 196, 120, 122, 58, and 3 bales respectively, the last two lots arriving on the 24th, and was sent forward as follows: Feb. 20th, 393 bales; Feb. 21st, 65 bales; Feb. 22d, 90 bales; Feb. 24th, 64 bales; Feb. 25th, 223 bales; Feb. 26th, 127 bales; Feb. 27th, 82 bales; March 1st, 3 bales.

The face of the way bills show that the through rate to New York was 90 cents per hundred pounds, and that defendant's proportion thereof was 23¹⁰/₁₀₀ cents. The way-bills, which were not shown to the shippers, differ somewhat in the mode of filling up the printed forms; but the following, dated January 29, 1873, is a sample:

(Form 1.)

No. 301.] ST. LOUIS, VANDALIA, TERRE HAUTE & INDIANAPOLIS RAILROAD.

Sheet

Conductor.

Manifest of Freight, from St. Louis to Indianapolis, January 29, 1873.

Description and No. of car.	Consignor.	Consignee and destination.	No. of pkgs.	Description of articles.	Weight.	Rate.	Prepaid freight.	Unpaid freight.	Charges.	Total.
225..... C. & C. I.....	339 335	Order. C. G. Meier & Co. London, Eng.				23.6 66.4				
			32	Bales of cotton, "V. I. C." lot of 59.	15,360	90		36 25		36 25
Van..... 216.....	330 335	Do.	32	" C.	15,360	23.6 66.4		36 25		36 25
E. & P. D.. 3625.....	333 345	Do.	33	" "	15,840	90 23.6 66.4		37 38		37 38
E. & P. D.. 3619.....	330 335	Do.	33	" "	15,840	23.6 66.4		37 38		37 38
E. & P. D.. 3015.....	330 335	Do.	31	" "	15,840	23.6 66.4		37 38		37 38
E. & P. D.. 3661.....	330 335	Do.	33	" "	15,840	23.6 66.4		37 38		37 38
E. & P. D.. 3008.....	330 335	Do.	33	" "	15,840	23.6 66.4		37 38		37 38
			229		109,920			259 40		259 40

Via. E. & P. D.

67, 68 The V. I. C. shipment began to arrive at Jersey City February 10th, and continued to do so almost daily, till March 19th, when all had arrived. The P. I. G. lot commenced arriving March 2d, and continued to do so almost daily until after the end of the month.

On the 30th day of January, 1873, in one instance, and the 28th day of February, 1873, in the other, the agent of the Erie & Pacific Despatch, at St. Louis, handed to Theodore Meier, and said Meier for said Meier & Co. received, bills of lading bearing those dates, purporting to be the bills of lading of the Erie & Pacific Despatch and the Oceanic Steam Navigation Company for these two lots of cotton, describing the goods and stating the agreed rates in English money, the consignors and consignees, and the destination, and signed by the agent of the Erie & Pacific Despatch, severally, but not jointly. The bills of lading, with the special conditions and exceptions printed therein, are as follows:

69, 70 [Offices of Erie and Pacific Despatch.—Sam De Bow, manager, 315 Broadway; T. A. Lewis, western manager, Indianapolis, Ind.; C. McGivern, G. E. agent, New York; Chas. S. Austin, G. W. ag't, Peoria, Ill.; R. G. Hoyt, agent, 305 Broadway, N. Y.; N. H. McLean, agent, Cincinnati, O.; Geo. S. Breckint, ag't, Louisville, Ky.; J. M. Booth, agent, Cleveland, O.; W. C. Lynn, Agent, Indianapolis, Ind.; J. M. Tennis, agent, Memphis, Tenn.; Allen McCoy, agent, St. Louis, Mo.; R. K. Dunkerson, ag't, Evansville, Ind.]

[Offices of the White Star Line.—J. H. Sparks, agent, 19 Broadway, N. Y.; Ismay Imrie & Co., managers, Liverpool and London. Oceanic, Celtic, Atlantic, Britannic, Baltic, Germanic, Republic, Asiatic, Adriatic, Tropic.]

Through bill of lading No. , of the Erie and Pacific Despatch, and the Oceanic Steam Navigation Co. from St. Louis to Liverpool, calling at Queenstown.

Shipped in apparent good order, by Adolphus Meier & Co., the following property

marked and numbered as per margin (contents of packages unknown, and weight subject to correction.)

Through rate, 6s 5½d gold per 100 lbs. @ 4.80 per £898 13s 6½d.

Gross weight 278.299 lbs., and 5 per cent. primage on ocean rate only.

Inland charges, £
£

Marks and numbers.	Articles.
<p style="text-align: center;">VIC (567)</p> <p>Order</p> <p style="text-align: center;">C. G. Meier & Co.</p>	<p>Five hundred and sixty-seven bales</p> <p style="text-align: right;">compressed cotton.</p> <p>London, Eng.</p>

To be delivered in like good order and condition unto C. G. Meier & Co., Liverpool, or to their assigns, he or they paying freight, in cash, for the said goods, as per margin, with primage and average accustomed, under the following terms and conditions, viz:

That the said Erie and Pacific Despatch and its connections, which receive said property, shall not be liable for breakage of packages of eggs, or for rust of iron and of iron articles, or for loss or damage by wet, dirt, fire, or loss of weight, or for condition of baling on hay, hemp, or cotton; nor for loss or damage of any kind on any article whose bulk requires it to be carried on open cars; nor for damage to perishable property of any kind occasioned by delays from any cause or by changes of weather; nor for loss or damage on any article or property whatever by fire or other casualty while in transit, or while in deposit or places of transshipment, or at depots or landings at all points of delivery; nor for loss or damage by fire, collisions, or the dangers of navigation while on seas, rivers, lakes, or canals. All goods or property under this bill of lading will be subject, at its owner's cost, to necessary cooperage or baling, and is to be transported to the depots of the companies, or landings of steamboats, or forwarding lines at the points receipted to, for delivery.

It is further agreed that said Erie and Pacific Despatch and its connections shall not be held accountable for any damage or deficiency in packages after the same shall have been receipted for in good order by consignees, or their agents at or by the next carrier beyond the point to which the bill of lading contracts. Consignees are to pay freight and charges upon the goods or merchandise in lots, or parts of lots, as they may be delivered to them.

It is further stipulated and agreed, that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

And it is further agreed, that the amount of the loss or damage so accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of said goods or property at the place and time of shipment under this bill of lading.

This contract is executed and accomplished, and the liability of the Erie and Pacific Despatch as common carriers thereunder, terminates on the delivery of the goods or property to the steamship at White Star Wharf, Jersey City, when the liability of the steamship company commences, and not before.

And it is further agreed, that the property shall be transported from the port of New York to the port of Liverpool (calling at Queenstown) by the Ocean Steam Navigation Company, limited, subject to the following terms and conditions, viz:

To be delivered from the ship's deck, where the ship's responsibility shall cease (the acts of God, the Queen's enemies, pirates, robbers, thieves, vermine, barratry of master or mariners, restraint of princes, rulers, or people, loss or damage resulting from insufficiency in strength of packages, sweating, leakage, breakage, stowage or contact with other goods, risk of lighterage, explosion or fire at sea in craft or on shore, before lading or after unlading, accidents from machinery, boilers, steam, or any other accident of the seas, rivers, and steam navigation, of whatever nature or kind soever, excepted; whether any one or more of all such exceptions arise, occur, or are in any way occasioned from or by the negligence, default, or error in judgment of the masters, mariners, engineers, or others of the crew, or of any of the servants or employees of the ship owners, or otherwise however; and with liberty during the voyage to call at any

kind occasioned by delays from any cause or by changes of weather; nor for loss or damage on any article or property whatever, by fire or other casualty, while in transit or while in deposit or places of transshipment, or at depots or landings at all points of delivery; nor for loss or damage by fire, collisions, or the dangers of navigation while on seas, rivers, lakes or canals. All goods or property under this bill of lading will be subject, at its owner's cost, to necessary cooperage or baling, and is to be transported to the depots of the companies or landings of steamboats or forwarding lines at the points receipted to, for delivery.

It is further agreed that said Erie and Pacific Despatch and its connections shall not be held accountable for any damage or deficiency in packages after the same shall have been receipted for in good order by consignees, or their agents at or by the next carrier beyond the point to which the bill of lading contracts. Consignees are to pay freight and charges upon the goods or merchandise in lots or parts of lots as they may be delivered to them.

It is further stipulated and agreed that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

And it is further agreed that the amount of the loss or damage so accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of said goods or property at the place and time of shipment under this bill of lading.

This contract is executed and accomplished, and the liability of the Erie and Pacific Despatch as common carriers thereunder terminates on the delivery of the goods or property to the steamship at White Star wharf, Jersey City, when the liability of the steamship company commences, and not before.

And it is further agreed that the property shall be transported from the port of New York to the port of Liverpool (calling at Queenstown) by the Ocean Steam Navigation Company, limited, subject to the following terms and conditions, viz:

To be delivered from the ship's deck, where the ship's responsibility shall cease, the acts of God, the Queen's enemies, pirates, robbers, thieves, vermine, barratry of master or marines, restraint of princes, rulers or people, loss or damage resulting from insufficiency in strength of packages, sweating, leakage, breakage, stowage or contact with other goods, risk of lighterage, explosion or fire at sea in craft or on shore, before lading or after unlading, accidents from machinery, boilers, steam, or any other accidents of the seas, rivers, and steam navigation, of whatever nature or kind soever, excepted; whether any one or more of all such exceptions arise, occur, or are in any way occasioned from or by the negligence, default, or error in judgment of the masters, mariners, engineers or others of the crew, or of any of the servants or employees of the ship owners, or otherwise however; and with liberty during the voyage to call at any port or ports, to receive fuel, to load or discharge cargo, or for any other purpose whatever; to sail with or without pilots, to tow and assist vessels in all situations; and in the event of the said steamer putting back to New York, or into any other port, or being otherwise prevented from proceeding in the ordinary course of her voyage, to tranship the goods by any other steamer.

Weights, contents, and value unknown, and not answerable for leakage or breakage. Freights payable in Liverpool without credit or discount upon the gross weight delivered. The goods to be taken alongside by the consignee, immediately after the vessel is ready to discharge, or otherwise they will be landed by the master, at the merchant's risk and expense. The collector of the port being hereby authorized to grant a general order for discharge immediately after the entry of the ship.

NOTICE.—In accepting this bill of lading, the shipper or other agent of the owner of the property carried expressly accepts and agrees to all its stipulations, exceptions, and conditions.

In witness whereof, the agent signing for the said railway and steamship companies hath affirmed to three bills of lading, of this tenor and date, one of which being accomplished, the others to stand void.

Dated in St. Louis, 25th February, 1873.

J. L. TRUMBULL,

Agent E. & P. Desp., Agents Severally but not Jointly.

(On the margin:) Attention of shippers is called to the act of Congress of 1851: "Any person or persons shipping oil of vitrol, unslacked lime, inflammable matches, or gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering, at the time of shipment, a note in writing, expressing the nature and character of such merchandise, to the master, mate, or officer or person in charge of the loading of the ship or vessel, shall forfeit to the United States one thousand dollars."

73, 74 Meier & Co. had been large cotton shippers by the Erie & Pacific Despatch Co. previous to 1873, and had received many bills of lading therefor, and did, in fact, read them so far as to see that the number of pounds and bales, the rate and destination, were correctly expressed; they received the bills of lading for the V. I. C. and P. I. G. cotton in the usual time, and it was understood between the Despatch Company and them, when they made the agreement for the transportation of the cotton, that bills of lading for the cotton would be given to them; that they made their shipments aforesaid by said Despatch Company as a matter of convenience, because it was necessary to have some one to look after the cotton in New York, and pay inland freight on it there; that Meier & Co. had no office or correspondent in New York, but the Erie & Pacific Despatch did have an office there, and Meier & Co. expected the Despatch Company to look after the cotton when it got there, and see that the inland charges on it were paid.

Theodore Meier, who alone, of said two firms, had anything to do with the making of the contracts, was not aware when he received the bills of lading of the special conditions or exceptions contained therein; nor was his attention drawn to them by the agent. He did not read the bills further than to see that in the written parts the description, rate, weight, destination, consignors, and consignees were correctly stated, and he never knew, nor did said firms know, that the bills contained these special provisions, limiting the carrier's liability, until after the loss complained of had occurred, and neither he nor said two firms ever assented to said special provisions. Mr. Meier expected to get bills of lading for the cotton, but there was no conversation on the subject or as to the terms they should contain, nor routes to New York.

On the 21st day of March, 1873, by a fire in the Erie Railway depot, at long dock, Jersey City, there were destroyed 132 bales 75, 76 of the V. I. C. and 589 bales of the P. I. G. cotton. Of the cotton thus lost, 65 bales had arrived March 2d, 68 bales more by March 9th, and the remainder on or before March 19th.

The last of the V. I. C. cotton left East St. Louis 48 days before the fire, and the last of the P. I. G. 20 days before the fire. The ordinary time for the transit was 10 days. Some of the V. I. C. went through in 12 days and some of the P. I. G. in 10 days from the departure from East St. Louis. The winter of 1872-3 was unusually cold and snowy, but it nowhere appears that any train or car containing any portion of this cotton was detained thereby. At Urbana the goods were transferred directly from the cars of one road to those of the other, and at Long Dock the Erie Railway trains went upon the dock itself in tracks within a few feet of where the lighters were brought to receive the cotton. On the arrival of the cotton at Jersey City, it was unloaded upon the dock of the Erie Railway, and left to lie there from two to nineteen days. It was not removed to, or stored in, any public warehouse, but was left exposed on the private dock of the Erie Railway in a depot built of wood and with a wooden roof. The White Star Line steamers were sailing for Liverpool every Saturday, and its agents knew of the cotton being on the Erie dock, and that it was to go by their line, needed it to fill their vessels, and made repeated demands for it, both of the agents of the Erie & Pacific Despatch and of the agents of the Erie Railway, and were refused by both. The V. I. C. cotton began to arrive in Jersey City on February 10th, 1873; the last might have arrived and all have been delivered by February 15, 1873, in the ordinary course of transportation. The P. I. G. cotton began to arrive on March 2d, 1873; the

last might have arrived and all have been delivered at the White Star dock by March 13th, 1873, in ordinary course.

All the cotton embraced in said two lots was carried over the 77, 78 connected line of railroads, in the amended petition mentioned, to the Erie Railway long dock; and all, except that portion destroyed as aforesaid, was, by the New Jersey Lighterage Company, acting under the direction and being in the employment of the Erie Railway, carried to, and delivered at, the White Star dock, and was there received by the White Star Line and transported to Liverpool.

The weight of the 132 bales of V. I. C. cotton destroyed was 67,031 lbs.; that of the 589 bales P. I. G. destroyed was 284,839 lbs. The value of the V. I. C. destroyed on the 15th day of February, 1873, when it should have been delivered at the White Star dock, was $19\frac{1}{8}$ cents per pound, aggregating \$13,322.41; and the value of the P. I. G. cotton destroyed on the 13th day of March, 1873, when it should all have been delivered at the White Star dock, was then 19 cents per pound, aggregating \$54,119 57.

After the loss occurred, the said Adolphus Meier & Co. and C. G. Meier & Co., for valuable consideration, assigned to plaintiff all their damages and right of action therefor against defendant, and each and all the other carriers responsible therefor, the plaintiff being the insurer for Meier & Co.

Of the said cotton marked V. I. C. 435 bales were delivered at Liverpool by steamers of the Oceanic Steam Navigation Company, to the order of C. G. Meier & Co., London, and of the cotton marked P. I. G. 458 bales were likewise delivered at Liverpool by steamers of said company.

On the 21st of March, 1873, an accidental fire occurred upon the docks of the Erie Railway Company, at Jersey City, New Jersey, and by said fire 132 bales of said cotton marked V. I. C., and 539 bales of that marked P. I. G., weighing in the aggregate 351,870 pounds, were destroyed. That said cotton so destroyed was, at the time of the fire, unloaded from the cars, and was stored in the freight-house of the Erie Railway Company awaiting delivery to the steamers of the Oceanic Steam Navigation Company. That said freight house was a suitable and proper 79, 80 place for the storage of the cotton, and the fire occurred without fault or negligence on the part of said Erie Railway Company, and every possible exertion was made to save said cotton, and to extinguish said fire. That there were 780 bales of said Meier cotton in the said freight-house, at the time of said fire, which had arrived there and been unloaded at the following dates and times respectively, to wit:

Mark and No. of bales.	Arrived.	Unloaded.	Arr'd before fire.	Unloaded before fire.
P. I. G., 33.....	March 2	March 6	19 days.	15 days.
V. I. C., 32.....	" 5	" 6	16 "	15 "
P. I. G., 32.....	" 8	" 18	13 "	3 "
" 33.....	" 9	" 14	12 "	7 "
" 31.....	" 9	" 14	12 "	7 "
" 32.....	" 10	" 18	11 "	3 "
" 32.....	" 10	" 12	11 "	3 "
" 25.....	" 10	" 14	11 "	7 "
" 33.....	" 11	" 12	10 "	3 "
" 31.....	" 11	" 18	10 "	3 "
" 4.....	" 12	" 14	9 "	7 "
" 30.....	" 12	" 18	9 "	3 "
" 33.....	" 12	" 14	9 "	7 "
" 33.....	" 12	" 14	9 "	7 "
" 34.....	" 13	" 14	8 "	7 "
" 33.....	" 13	" 14	8 "	7 "
" 33.....	" 13	" 14	8 "	7 "
" 33.....	" 13	" 14	8 "	7 "
" 33.....	" 13	" 18	8 "	3 "
" 32.....	" 15	" 18	6 "	3 "
V. I. C., 33.....	" 9	" 14	12 "	7 "
" 31.....	" 9	" 14	12 "	7 "
" 2.....	" 9	" 12	12 "	9 "
P. I. G., 17.....	" 17	" 18	4 "	3 "
" 31.....	" 12	" 18	9 "	3 "
" 3.....	" 17	" 18	4 "	3 "
V. I. C., 19.....	" 19	" 20	2 "	1 "
" 31.....	" 19	" 20	2 "	1 "

81, 82 And of these 780 bales 59 were saved from the fire.

That there arrived of said cotton, marked P. I. G., on March 20th, 1873, 53 bales, which had not been unloaded, and were not burned, and that there arrived subsequent to March 21, 1873, to wit, between March 22d and 28th, both inclusive, 221 bales of said cotton marked P. I. G. That immediately upon the arrival of each car of said cotton at the Erie freight house, notices of such arrival were served upon the agents of the Erie and Pacific Despatch in New York, which notices were in the words and figures hereinbefore set forth. That the cotton which reached Jersey City was not delivered to the steamship, because the Erie & Pacific Despatch failed to get from the Oceanic Steam Navigation Co. the necessary permits, and to order a delivery of the cotton to said last named company.

According to the custom of doing business in New York, which has prevailed for more than ten years previous to 1873, no freight would be received at the dock of the steamship company, to be loaded on one of its vessels, unless accompanied by a permit from the freight agent of the line. In accordance with this custom and mode of doing business, it was necessary for the Erie Railway Co. to have a permit, as afore-said, before any of the Meier cotton could be delivered and received at the White Star docks, and it was the uniform practice for the Erie & Pacific Despatch, when freight was shipped by said company, or to its care, or on its account, to obtain permits for such freights as they desired delivered at said White Star dock, and send said permit, with the notice of arrival of such cotton as it desired shipped, as an order to the Erie Railway Company, to deliver the cotton mentioned in such notice to the steamship designated in the permit, and the Erie Railway Company delivered said cotton to said White Star dock immediately upon the receipt of such order.

The agent of the Oceanic Steam Navigation Co., commonly known as the White Star Line, endeavored to get this Meier cotton deliv-

83, 84 ered by demanding it of the agent of the Erie & Pacific Despatch, but that company failed to deliver it.

In all cases of freight, ocean bound, coming from the West over the Erie Railway, shipped by the Erie & Pacific Despatch, or consigned care of Erie & Pacific Despatch, the Erie Railway Company treated the Despatch Company as the consignee in New York, and held the freight subject to the order of the Despatch Company. The Erie Railway Company were ready and able to deliver the said Meier cotton as it arrived.

The Erie & Pacific Despatch was a corporation organized under the laws of Kansas, and engaged in the business of soliciting and forwarding freight, with offices in St. Louis, Indianapolis, and New York, separate and distinct from the offices of the railroad companies; it owned no railroad, but had arrangements with different railroads to haul the freight obtained by it over their respective lines; it had also arrangements with all the steamship lines out of New York, including the White Star Line, whereby it could issue a joint bill of lading for freight going from points distant from the seaboard to foreign ports; in January and February, 1873, its freights from St. Louis to New York were transported sometimes over defendant's line, sometimes over the Ohio & Mississippi Railroad, the Pan-Handle Railroad, the Cincinnati, Hamilton & Indianapolis Railroad, the Atlantic & Great Western Railroad, and the Erie Railway, as the Despatch Co. directed, in the absence of any route prescribed by the shipper.

Upon the foregoing facts, the court declares the law to be, that the plaintiff is not entitled to recover, and orders judgment for the defendant with costs.

Judgment.

It is therefore considered by the court that the plaintiff take nothing by its writ herein, and that the defendant, the St. Louis, Vandalia, Terre Haute and Indianapolis Railroad Company go hence without day, and have and recover against the plaintiff, the St. Louis Insurance Company, its costs in this behalf expended, and that a fee bill or execution issue therefor.

(Signed)

JOHN F. DILLON.
SAMUEL TREAT.

And afterwards, at said March term, 1878, of said court, and on the 2d day of May, 1878, the following further proceedings were had in said cause, to wit:

Motion for new trial overruled.

ST. LOUIS INSURANCE COMPANY, PLAINTIFF, }
v. }
ST. LOUIS, VANDALIA, TERRE HAUTE AND IN- }
dianapolis Railroad Company, defendant. }

Now come the parties by their respective attorneys, and the court having considered the motion for a new trial herein, and being fully advised in the premises, orders that said motion be and the same is hereby overruled.

Writ of error allowed.

Whereupon said plaintiff, by its attorney, presents to the court its

bill of exceptions herein, which is allowed, and signed, and ordered to be filed as part of the record in this cause; and also presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation, citing and admonishing the said defendant to be and appear at a Supreme Court of the United States, at the next term thereof, on the second Monday of October next, which said writ of error is allowed, and said citation signed by the judge. And the said plaintiff also presents to the court a bond in the penal sum of five hundred dollars, which said bond is approved.

The said bill of exceptions is in words, and figures following, to wit:

Bill of exceptions.

ST. LOUIS INSURANCE CO.	}	March term, 1878.
<i>vs.</i>		
ST. LOUIS, VANDALIA, TERRE HAUTE & INDIANAPOLIS R. R. Co.		

Be it remembered, that on the 23rd day of March, 1878, the 87, 88 plaintiff filed its motion for a new trial herein, which motion was in the words and figures following:

Motion for new trial.

In the circuit court of the United States for the eastern district of Mo. March term, 1878.

ST. LOUIS INSURANCE CO.	}
<i>vs.</i>	
ST. LOUIS, VANDALIA, TERRE HAUTE & INDIANAPOLIS R. R. Co.	

And now comes the plaintiff and moves to set aside the judgment, and for a new trial herein, because—

1. The court admitted improper and illegal testimony offered by defendant.
2. The court rejected proper and legal testimony offered by plaintiff.
3. The court erroneously declared the law on the facts found.
4. The finding was against the evidence.
5. The finding was against both law and evidence, and against the law under the evidence.
6. The finding was against the weight of evidence.
7. The facts found are insufficient to support the judgment.
8. The judgment was rendered in favor of defendant, when it should have been rendered for the plaintiff.

JOHN G. CHANDLER,
Att'y for Plaintiff.

The finding of facts referred to therein being the same special finding fully set forth in the record herein.

And afterwards, the said motion coming on to be heard on the 2d day of May, 1878, the same was by the court overruled, to which ruling of the court, in overruling said motion, the plaintiff then and there excepted, and prayed the court to sign and seal this its bill of exceptions, and the same is done accordingly.

[SEAL.]

SAMUEL TREAT, *Judge.*

89, 90 And the said bond, so approved as aforesaid, is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, the St. Louis Insurance Co., as principal, and James. E. Bull, George Knapp, and Adolphus Meier, as sureties, are held and firmly bound unto the St. Louis, Vandalia, Terre Haute & Indianapolis Railroad Company in the full and just sum of five hundred dollars, to be paid to the said railroad company, its successors or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this second day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas lately, at the March term, 1878, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between the St. Louis Insurance Company, plaintiff, and the St. Louis, Vandalia, Terre Haute & Indianapolis Railroad Company, defendant, judgment was rendered against the said plaintiff; and the said plaintiff having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington, the second Monday of October next:

Now, the condition of the above obligation is such, that if the said plaintiff shall prosecute said writ to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

[CORPORATE SEAL.]

THE ST LOUIS INSURANCE CO.,	
By ADOLPHUS MEIER, <i>Pres't.</i>	[SEAL.]
JAMES R. BULL.	[SEAL.]
GEORGE KNAPP.	[SEAL.]
ADOLPHUS MEIER.	[SEAL.]

Approved by—

SAMUEL TREAT, *Judge.*

91, 92 The following is the

Opinion of the court.

It is not deemed necessary to discuss the many propositions of law raised by the counsel nor to review the numerous authorities cited.

The controlling doctrine was announced as early as in the 6th Howard, 344 (The New Jersey Steam Navigation Company vs. The Merchants' Bank of Boston), which doctrine has been fully recognized in all subsequent cases before the United States Supreme Court.

That doctrine rests on sound and elemental principles. When a contract is made with an express company, whether such exists for the transportation of small packages or for general shipments, the shipper deals primarily with such company and looks to it under its contract. But as such companies may have no means of their own for transportation according to the terms of their contracts, and have to employ steamers or railroads as their agents, if the shipper seeks to hold their agents responsible he must do so only through the contract made by the express company with himself. So far as he is concerned the express

company is the principal and must respond; as between the express company and its agents, their respective liabilities inter sese can neither restrict nor enlarge the obligations of the original parties.

The shipper can hold the express company to its contract and can, through that contract, pursue its agent. The latter is held, if a common carrier, so far as the shipper is concerned, to all the obligations of a common carrier as the same may exist under the lawful restrictions made by the contract with the express company and no further.

In this case the contract was with the Despatch Company for 93, 94 transportation from St. Louis to Liverpool. No inland route was designated, but the ocean-bound route was to be by the White Star Line from New York. The Despatch Company had arrangements whereby it could forward to New York by any one of several railroad routes. No order was given by the shipper for any designated route nor any contract made for a specified route to New York. The contract, however, with the Despatch Company did limit the liabilities of the defendant, under the facts stated; to losses which might occur while the property was on its route.

The facts, undisputed, are that the defendant did receive and forward the cotton beyond its line in due time and in good order and condition. That is all it agreed to do, and is all that the Despatch Company by its contract of affreightment agreed should be done by the defendant. The wrong or injury complained of did not occur through any act or agency of the defendant, but long after it had ceased to have the cotton in its possession.

If wrong there were for which a common carrier would be liable, that wrong occurred when the Erie Railway had control or possession of the cotton shipped.

The contention, however, is that inasmuch as the several railroad companies whose roads constituted a continuous line from St. Louis to New York had an agreement inter sese for the transportation of goods from the point of delivery to the point of destination, whereby they would prorate freight; the first road to which the cotton was delivered is bound as a common carrier not only for its own conduct but also for the conduct of each and every railroad company intermediate between it and the point of destination. In some cases that obligation exists and should be strictly enforced. In the cause under consideration, however, the defendant did not contract to have the cotton transported from St. Louis to New York, nor did it receive compensation for 95, 96 any such through shipment. Its contract as set out specifically in the bill of lading given by the Despatch Company, limited its liability to what occurred on its own road; and the plaintiff suing through that contract with the Despatch Company cannot enlarge its terms as to the defendant so as to hold it to a greater liability than that contract imposed. If the defendant is bound as a common carrier by the contract of the Despatch Company because it was one of the railroads employed, then it cannot be bound beyond the terms of said contract or its obligations as a common carrier independent of said contract. As a common carrier, it was bound, in the absence of an express agreement to the contrary, by what occurred solely on its road. By the contract of the Despatch Company its liability was expressly limited to that measure of obligation. Hence it can be held to no liability, either under said contract or as a common carrier, for the loss that occurred in New York long after its duties with respect thereto had ceased.

97, 98 THE UNITED STATES OF AMERICA,
Eastern District of Missouri, set:

I, M. M. Price, clerk of the circuit court of the United States, in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true copy of the record and proceedings had in the case of The St. Louis Insurance Company, plaintiff, vs. St. Louis, Vandalia, Terre Haute and Indianapolis Railroad Company, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this 17th day of May, A. D. 1878.

[SEAL.]

M. M. PRICE, *Clerk.*
 By A. P. SELBY, *Deputy.*

99 Supreme Court of the United States. October term, 1878. In error.

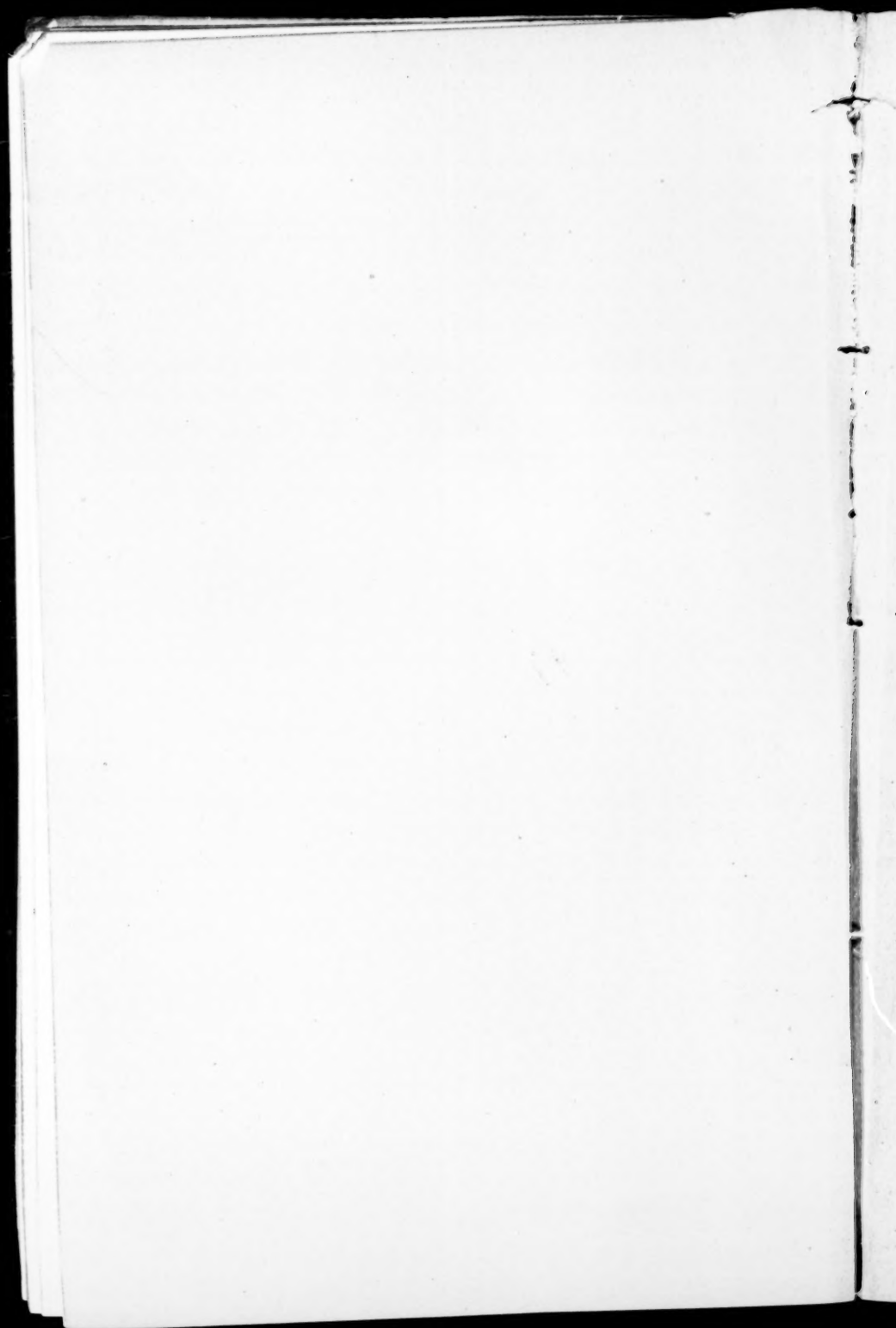
ST. LOUIS INSURANCE CO.,
v.
 ST. LOUIS, VANDALIA, TERRE HAUTE & IN-
 dianapolis, R. R. Co. }

Afterwards, to wit, on the *the* second Monday of October, in this same term, before the justices of the Supreme Court of the United States, comes the said St. Louis Insurance Company, by John G. Chandler, its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit: that by the record aforesaid it appears that the judgment aforesaid given was given for the said defendant & against the said plaintiff, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendant, and the said plaintiff prays that the said judgment may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it hath lost by occasion of the said judgment, etc.

JOHN G. CHANDLER.
Att'y for Plaintiff in Error.

(Indorsed :) St. Louis Ins. Co., v. St. L., V., T. H. & Ind. R. R. Co. Assignment of error. Filed May 4, 1878. M. M. Price, clk. John G. Chandler, att'y for pl'ff in error.

(Indorsement on cover :) No. 288. The St. Louis Insurance Company, plaintiff in error, vs. The St. Louis, Vandalia, Terre Haute and Indianapolis Railroad Company. E. Missouri C. C. U. S. Filed 17th October, 1878.





SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1880.

ST. LOUIS INSURANCE CO.,

Plaintiff in Error,

vs.

ST. LOUIS, VANDALIA, TERRE HAUTE
& INDIANAPOLIS R. R. CO.,

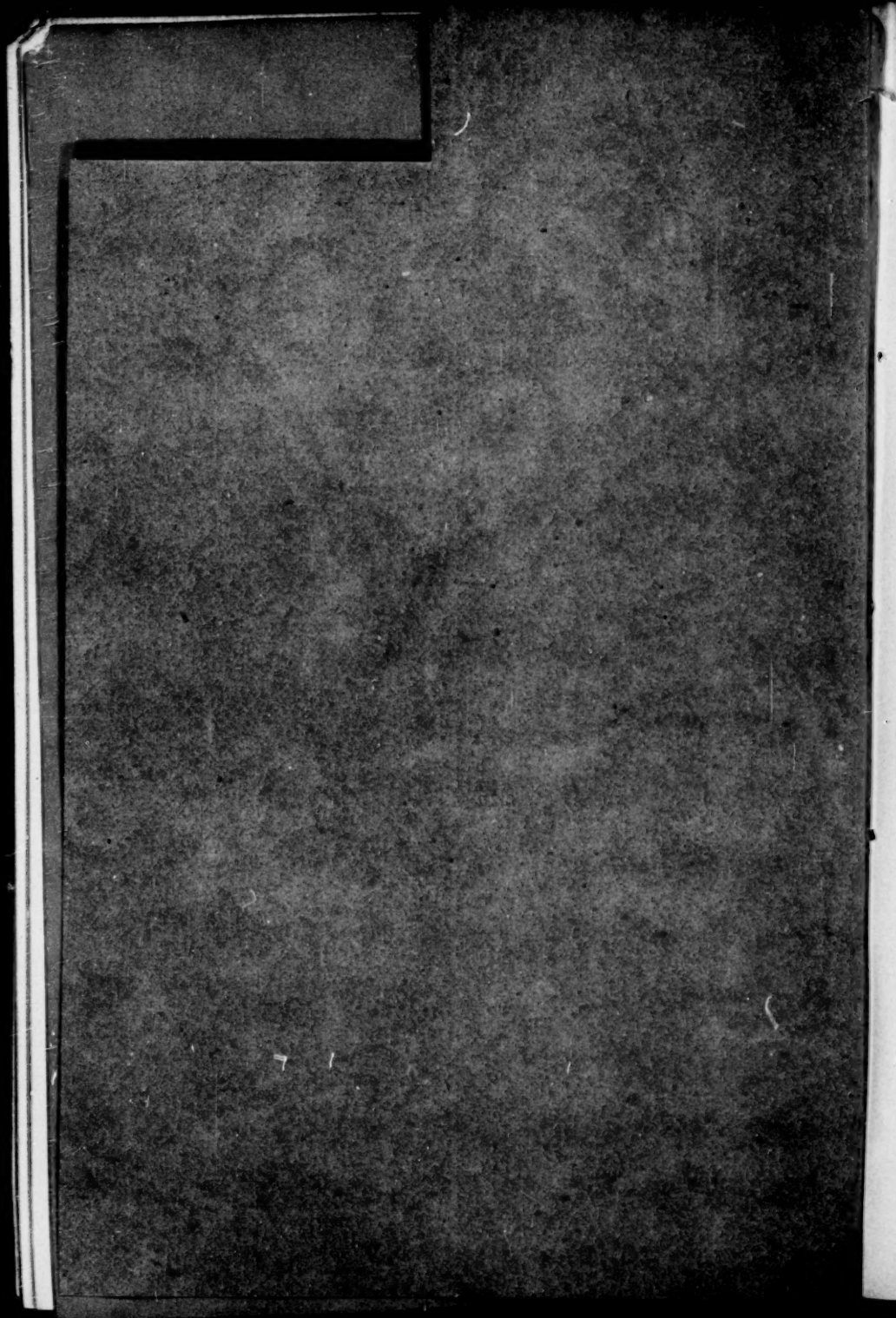
Defendant in Error.

No. 288.

BRIEF OF PLAINTIFF IN ERROR.

JOHN G. CHANDLER,

Counsel for Plaintiff in Error.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1880.

ST. LOUIS INSURANCE CO.,

Plaintiff in Error,

vs.

ST. LOUIS, VANDALIA, TERRE HAUTE

& INDIANAPOLIS R. R. CO.,

Defendant in Error.

No. 288.

STATEMENT OF PLAINTIFF IN ERROR.

This cause was originally commenced by the plaintiff in error against the defendant in error in the Circuit Court of St. Louis County, Missouri, and was thence removed, on petition of defendant in error, to the Circuit Court of the United States for the Eastern District of Missouri. (Record, page 6.)

In the latter court the plaintiff filed an amended petition. (Record, pages 7-9.)

The amended petition declared in two counts that the defendant, the St. Louis, Vandalia, Terre Haute & Indianapolis R. R. Co., whose proper corporate name is Terre Haute & Indianapolis R. R. Co., but which does business under the name by which it is here sued, during the year 1873, with the Pittsburgh, Cincinnati & St. Louis

R. R. Co., the Atlantic & Great Western Railway Co., and the Erie Railway Co., jointly constituted a continuous and connected line of common carriers over their several railroads between divers places, and amongst others, between the City of St. Louis, in the State of Missouri, and a certain dock located in Jersey City, N. J., and known as the White Star Dock, or Dock of the White Star Line, and as such line jointly carried on the business of transporting goods and merchandise for hire between St. Louis and said White Star Dock, jointly charging and receiving for such transportation certain freight or hire, which they divided amongst themselves in proportions mutually understood and agreed between themselves, but to plaintiff unknown; that on or about January 0, 18 3, the firm of Adolphus Meier & Co., of St. Louis, and the firm of C. G. Meier & Co., of London, being joint owners of 567 bales of compressed cotton, marked V. I. C., then at St. Louis, delivered the same to said line of carriers to be transported by said line from St. Louis to said White Star Dock, and there delivered to the Oceanic Steam Navigation Co., generally known as the "White Star Line," common carriers between said dock and Liverpool, England; that said line of common carriers accepted and received said cotton, and agreed for reasonable hire then by said firms agreed to be paid them, to carry the same to said White Star Dock, and there deliver the same as aforesaid; said White Star Line at the same time agreeing to accept the same at said dock and transport the same to Liverpool; that on or about the 18th day of February, 1873, said two firms owning 1,047 bales of compressed cotton, marked P. I. G., at St. Louis, likewise delivered the same to said line of carriers, who accepted and agreed to carry the same for like hire to said dock, and there deliver to said White Star Line, to be carried by them to Liverpool, the latter line then agreeing so to do; that as to both said shipments, it was the duty of said line of carriers to take care of the cotton, to carry and deliver the same within a reasonable time, but that they

failed to so carry and deliver, and thereby 132 bales of the V. I. C., and 589 bales of P. I. G. cotton were, on the 21st day of March, 1873, and whilst in possession of said line of carriers and in transit between St. Louis and the White Star Dock, destroyed, and were never delivered to said White Star Line; that about March 1, 1875, said firms assigned their damages and right of action for said loss to plaintiff; that defendant, nor said line of carriers, has paid the damages to said firms or plaintiff, and that the damages amount to \$150,000.00.

The answer, after admitting defendant's incorporation as alleged, put in issue the allegations of the petition as to the continuous line of railroads; that they were common carriers over the alleged continuous line; that they jointly charged or received freight or hire, or divided such joint charge amongst themselves; that said firms delivered the cotton to said line of carriers, or that they accepted the same to be transported as alleged; that defendant was negligent; that the White Star Line existed, or agreed to accept and carry as alleged; that the cotton was destroyed, or plaintiff or said firms damaged, and that the damages were assigned.

The answer then proceeded to allege that in 1873 there existed a corporation or association called Erie & Pacific Despatch; that Adolphus Meier & Co. entered into an agreement with the E. & P. Despatch by which said E. & P. Despatch agreed to receive and transport from St. Louis to Liverpool the cotton mentioned in the two counts of the petition and deliver the same to C. G. Meier & Co., or order, they paying freight; that in said agreement it was stipulated that the carrier should not be liable for loss by fire occurring in the transit; that the Company in whose actual custody the goods should be at the time of loss should alone be liable, and the carrier so liable should have full benefit of any insurance that might have been effected on the goods; and that such loss should be computed according to the value at the time and place of shipment. The

answer then alleges that the E. & P. Despatch delivered to the defendant said cotton to be carried from East St. Louis to Indianapolis, and there delivered to the next succeeding carrier; that defendant did so carry and deliver the same and no part thereof was lost or injured while in defendant's custody. (Record, pages 10-12.)

The replication put in issue all the new matter of the answer. (Record, page 12.)

On the 19th day of March, 1878, the cause having been heard before the court, a jury having been waived by stipulation in writing, there was a special finding of facts as follows: (Record, pages 12-28.)

SPECIAL FINDING.

During the year 1873 the defendant, under the name of the St. Louis, Vandalia, Terre Haute & Indianapolis Railroad, sometimes also called the Vandalia Line, owned and operated a line of railroad from East St. Louis, Illinois, to Indianapolis, Indiana; the Pittsburgh, Cincinnati & St. Louis Railroad Company owned and operated a line of railroad from Indianapolis to Urbana, Ohio, and other places; the Atlantic & Great Western Railway Company owned and operated a line of railroad from Urbana to Salamanca, New York, and to and from other places; and the Erie Railway Company owned and operated a line of railroad from Salamanca to Jersey City, on New York Harbor, opposite the city of New York. These several railroads were common carriers of goods. The Erie Railway Co., by means of barges and steam tugs which it owned or employed, carried goods from its depot or warehouse at Long Dock, Jersey City, to its depot, or to any warehouse in New York city, and to the docks of the various steamer lines in Jersey City and New York city, in New York Harbor. Goods consigned to a warehouse in New York city on "free delivery" were called "inspection freights." For the delivery of "inspection freights" and goods to the steamers, the Erie Railway

Company employed the New Jersey Lighterage Company, a corporation whose business was to lighter goods in New York Harbor. Upon through shipments from East St. Louis to Jersey City by the aforesaid railroads, reshipment of the goods was necessary at Urbana, where the Pittsburgh, Cincinnati & St. Louis Railroad intersected with the Atlantic & Great Western Railway, the gauge of the latter and of the Erie Railway, though the same with each other, differing with that of the Pittsburgh, Cincinnati & St. Louis Railroad and that of defendant's road; but shipments through to New York might be by other roads, and if no specific road was designated, any one of other roads might be pursued. There was at St. Louis, Mo., a corporation known as the Transfer Company, whose business was to haul goods from St. Louis to the various railroad depots in East St. Louis, including defendant's. The Oceanic Steam Navigation Company, usually known as the "White Star Line," was a corporation owning sundry ocean steamers, and was a common carrier between New York and Liverpool, England, receiving and delivering goods at their dock in Jersey City, distant 723 feet from the Erie Railway Long Dock. The Erie & Pacific Despatch was a Kansas corporation called a fast freight line, whose business was to solicit and forward freights.

There were several trunk lines of railroad between St. Louis and New York, including the one above particularly described, and also one composed of defendant's road, and the Pittsburgh, Cincinnati & St. Louis Railroad, and Pennsylvania Railroad. By this latter line, the defendant made its through shipments to New York in the absence of special contract or instructions from the shippers otherwise requiring.

The several railroads constituting the various trunk lines between St. Louis and New York had an arrangement between themselves in 1873, and for seven or eight years before, whereby the general freight agents of the roads terminating at St. Louis made what was called a joint tariff to

New York, fixing through rates, which were divided amongst the several roads constituting a through line; according to an estimate of distances, the goods were to be carried by each road, upon the basis of the shortest line. Losses occurring on through shipments, if not located, were pro-rated as between the roads themselves in the same ratio as the freight moneys, but if located, were as between the roads, to be paid by the road on which they occurred.

These trunk lines made and published on the 1st day of October, 1872, such a joint tariff, the defendant acting by its general freight agent, H. W. Hibbard. The title page thereof is as follows:

"JOINT
RATES OF TRANSPORTATION
FROM SAINT LOUIS
VIA

Toledo, Wabash & Western—Ohio & Mississippi—Chicago & St. Louis—St. Louis, Vandalia, Terre Haute & Indianapolis—Indianapolis & St. Louis—St. Louis & Southeastern—and St. Louis, Belleville & Southern Illinois Railroads. Taking effect at St. Louis, Monday, Oct. 21st, 1872.

John B. Carson, General Freight Agent, T. W. & W. R. R.			
Wm. Duncan,	"	"	O. & M. R'y.
James Smith,	"	"	Chi. & St. L. R. R.
H. W. Hibbard,	"	"	Vandalia Line.
John C. Noyes,	"	"	I. & St. L. R. R.
John W. Mass,	"	"	St. L. & S. E. R. R.
H. L. DePew,	"	"	St. L., B. & S. I. R.R.

C. E. CANDEE,

General Agent, Toledo, Wabash and Western R.,
S. W. cor. Main and Olive Streets,
St. Louis, Mo."

By this tariff, which continued in force till after the loss complained of in this case, the "all rail rates in cents per

hundred pounds on compressed cotton from St. Louis and Belleville to New York," were fixed at 90 cents. There was a memorandum in this tariff that the rates named were subject to change at any time. The joint tariffs were put into the hands of the agents of the railroads for their guidance in making contracts, and were also distributed to shippers and the public generally.

There were arrangements effected between the Erie & Pacific Despatch and sundry railroads having connections terminating in New York, under which the Despatch was empowered to contract for the transportation of goods according to the tariff rates, or any special rates furnished by the respective railroads, the roads agreeing to carry the goods so contracted for to their proper destination. The Erie & Pacific Despatch agreed with the railroads to establish offices and agencies at various points on the lines of railroad, and amongst others at St. Louis and New York City, and did establish such offices and agencies. The Erie & Pacific Despatch were to solicit and secure business, and so take care of it that other competing lines could not get it away; and all lines running into New York other than those with which the Erie & Pacific Despatch had an arrangement, were competing lines. The Despatch could make no contract or fix any rate for the carriage of goods over defendant's road except as authorized by defendant. The Despatch had such agreements with the four railroads named in the amended petition, including defendant, and a large amount of business was done over this line and defendant's road thereunder.

On the arrival of Erie & Pacific Despatch shipments at Indianapolis, they were sometimes sent forward by defendant as the Despatch Co. ordered, over the Pittsburgh, Cincinnati & St. Louis Railroad, and sometimes by what is known as the Indianapolis & Junction Road, to the intersection of the Atlantic & Great Western Railway, and thence by the latter and the Erie Railway to New York.

The Erie & Pacific Despatch had a separate agreement

with each of the railroads constituting the through line, in some instances oral, and in others in writing; the former being the case with defendant's contract, the latter with that of the Erie Railway. In all cases when a through rate was contracted for, the several railroads of the connecting line participated therein according to the aforesaid arrangement for pro-rating through freights with each other. The railroads collected the freight from the consignees, divided it amongst themselves, and paid to the Erie & Pacific Despatch, for its services, a commission of so much per cent. on the gross freights, for "pound freight," and 60 cents a bale on cotton, each road settling separately with the Despatch for its dues.

The written contract between the Erie Railway and the Erie & Pacific Despatch was as follows:

This Agreement, entered into this first day of April, one thousand eight hundred and seventy-two, between the ERIE RAILWAY COMPANY, party of the first part, and THE ERIE & PACIFIC DESPATCH, party of the second part, WITNESSETH:

FIRST. For and in consideration of one dollar in hand paid, the receipt of which is hereby acknowledged, the party of the first part hereby agrees to transport all through freight secured by the Erie & Pacific Despatch Company, either eastward or westward bound, passing between Philadelphia, Pa., New York City, Jersey City, Albany, N. Y., Boston, Mass., and common or competing points in New England, and common or competing points on the line of the said Erie Railway; except that on east bound freight they shall receive no commission on shipments from any station on the line of the railway of the party of the first part.

SECOND. The party of the second part shall issue its own bills of lading to shippers, subject as to rates to the current through rates of the party of the first part, which

rates shall at all times be as low as the rates furnished to any other party or parties.

THIRD. The party of the second part shall establish and maintain at its own expense, independent and efficient agencies for soliciting and procuring freight in the cities of New York and Boston, and other cities in the East or West, as may be deemed necessary by the parties hereto.

FOURTH. The party of the first part agrees to receive, load and unload, deliver and way-bill, and furnish daily an impression copy of each and every way-bill of both eastward and westward bound freight, free of charge, to the party of the second part.

The party of the first part further *agrees to assume all the risks of common carriers*, and to pay all damages to, or loss of property while on their line of road or in their possession; and in case property is lost or damaged, and the loss and damage cannot be definitely located, the party of the first part agrees to pay said loss, in proportion to what was received for transporting the same, subject, however, to the liability limitation contained in the "Bills of Lading" of the parties of the first part.

FIFTH. The party of the first part agrees to transport all freight known as first and second class freight, on the fastest freight trains running over its road, and to run the same and all other through freight trains as to enable the party of the second part to deliver freight between competing points in the East or West as quickly as it is done by any other competing line or road.

SIXTH. The party of the first part further agrees to furnish passes over its line of road for the officers and agents of the party of the second part, traveling on the business of the said party of the second part, on regular application from their superintendent.

SEVENTH. The party of the second part agrees to maintain the authorized rates of the party of the first part, and to be governed in the transportation of through business by

any obligation entered into by the party of the first part with their competing lines for the maintainance of rates.

EIGHTH. It is further agreed, that in consideration of the mutual benefits to be derived by the parties hereto, the party of the first part agrees to pay the said party of the second part a commission on west bound freight, of fifteen per cent. of their gross earnings, as per their way-bills on first, second and third class freight, and ten per cent. on their gross earnings, as per their way-bills, on fourth and special class freight from Philadelphia, Pa., New York, Jersey City, Albany, N. Y., Boston, Mass., and competing points in New England, to Corry, Pa., Union, Pa., Oil City, Pa., Greenville, Pa., Shenango, Pa., Cleveland, O., Youngstown, O., Sharon, Pa., Niles, O., Ravenna, O., Akron, O., Mansfield, O., Galion, O., Marion, O., Urbana, O., Dayton, O., Hamilton, O., Cincinnati, O., Chicago, Ill., Louisville, Ky., St. Louis, Mo.

On east bound freight, the party of the first part agrees to pay the party of the second part a commission of ten per cent. of their earnings (gross), as per their way-bills, on first, second and third class freight, and eight per cent. of their gross earnings, as per their way-bills, on fourth class freight from Cleveland, O., Chicago, Ill., Louisville, Ky., St. Louis, Mo., and on freight from Mansfield, O., Galion, O., Urbana, O., Dayton, O., Hamilton, O., or other competing points on the Atlantic and Great Western Railroad, providing such freight originated from points off of said line, it being understood that no commission is to be paid on freight originating at such stations; and the commissions on west bound freight shall be paid on or before the fifteenth of each month.

NINTH. The party of the first part further agrees to give the party of the second part, at all times, as low rates as are given to any other line running over the road of the party of the first part, and that they will pro-rate any rate on east bound freight made by authority of the road leading from the point, provided said road is duly au-

thorized to make through rates over the road of the parties of the first part, and that they will pro-rate all losses, damages and rebates that are pro-rated with any other line running over the Erie Railway.

TENTH. This contract to continue in full force and effect for five years, from the first day of April, one thousand eight hundred and seventy-two, but may be terminated by either party after two years, by a notice in writing, in ninety days from the date of said notice.

IN WITNESS WHEREOF, the party of the first part has hereto set its corporate seal, and caused these presents to be duly signed by its Vice-President, and the said party of the second part have caused the same to be duly executed the day and year first above written.

ERIE RAILWAY CO.,

By A. S. DIVEN, *Vice-Pres't.*

ERIE & PACIFIC DESPATCH,

By SAM DE BOW, *Gen'l Manager.*

Seal of
Erie Railway
Company.

The agreement between the defendant company and the said Despatch, though oral, was in substance the same as the aforesaid agreement with the Erie Railway Company.

On all shipments from St. Louis to New York, by the line composed of the four roads mentioned in the petition, the defendant paid the transfer charges from St. Louis to East St. Louis, and the Erie Railway paid the lighterage whether the goods were to go to New York proper, or were foreign bound, and these transfer and lighterage charges were included in the through rate named by defendant. On all shipments from New York to St. Louis by this line the defendant collected the freight money from the consignees, and retaining its proportion, accounted for the residue to the next road in the line, which, in like manner, deducted its share and accounted in the same way to the next, and so on to the beginning of the line. On shipments from St. Louis to New York City proper, the Erie Railway collected the freights from the consignees, and, in like manner, settled

with the next preceding carrier, and so on in the inverse order of the transportation to the first carrier. These settlements between the roads were made periodically upon accountings between them.

The Erie & Pacific Despatch had an arrangement or agreement with the White Star Line, by which the Despatch could contract for shipments from New York to Liverpool at rates given by the steamer line, the latter agreeing to receive the goods at their dock in Jersey City, and to transport them to Liverpool, but the Despatch had no power to bind the steamer line for any risks incurred in the inland transportation. The White Star Line paid the Despatch no commission or other compensation—their remuneration was obtained exclusively from the railroads under the arrangements above set forth. On through shipments from St. Louis to Liverpool the Despatch contracted for a through rate in this way: They applied to H. W. Hibbard, defendant's general freight agent, for the inland rate—that is, the all-rail rate—including lighterage and transfer charges as aforesaid; or they took it from the published tariff; though the agents of the fast freight lines, of which the Despatch was one, were in the habit of applying to Mr. Hibbard for special rates. The inland rate furnished by defendant was added to the ocean rate given by the White Star Line, and this sum constituted the through rate to Liverpool at which the Despatch contracted with the shipper. In no case did the Despatch charge any greater through freight than the sum of the ocean and inland rates thus furnished.

On the arrival at Jersey City of goods bound to Liverpool under Erie & Pacific Despatch bills of lading, or marked or way-billed as Erie & Pacific Despatch shipments, the usual course of business was this: Notices of the arrival of the goods were made out and signed by the Erie Railway agent, the same in form given to ordinary consignees, giving information to the Erie & Pacific Despatch Company of the arrival of the goods, the amount of freight and charges, and that a failure to remove the goods in a reasonable time

would be construed as an assent to the company's storing them in a suitable *public* store or warehouse at the owner's expense and risk, subject, however, to the lien of the company for its transportation and removal charges, and subject to storage charges, and further requiring all checks to be made payable to the order of the Erie Railway Company, and stating that if the consignee should, within twenty-four hours after the receipt of the notice, inform the Erie Railway along side of what vessel he desired the freight delivered, the company would make the delivery; and if such notice should not be given within twenty-four hours the freight would be warehoused at the risk and expense of the owner.

The following is the form of notice :

ERIE RAILWAY COMPANY.

SPECIAL NOTICE.

A failure to receive and remove the property mentioned below promptly will be regarded as showing an intention to allow the company to store the property in any suitable public store or warehouse at the expense of the owners, there to remain, uninsured, at the risk of the owner or claimant, subject, however, to the lien of this company for its transportation and removal charges, and subject to storage charges.

Terms cash on delivery.

From 187..
..... Collector's office,
W. B. (*i. e.* Way Bill) Jersey City
Car 187..
M. (*i. e.* to fill in with Consignee)
Care

The following freight consigned to your address, now ready for delivery at (*i. e.* blank left to be filled in with A. M. or P. M., according to circumstances).

Hhds.,
Barrels,
Packages,
Boxes,
Bales,

Rolls,
Sides,
Tierces,
Bags,
Bundles.

Amount of freight and charges, \$.....

R. S. HAIGHT.

Return this notice to Collector's office at Jersey City and get receipted bill.

There was printed across the face the following: "All cheques must be made payable to the order of the Erie Railway Company."

Then, in red print, the following: "If any consignee shall, within twenty-four hours after the receipt of this notice, notify the Erie Railway Company, at the Collector's office, Jersey City, alongside what vessel he desires this freight delivered, the company will make the delivery.

"If such notice shall not be given within the twenty-four hours, the freight will be warehoused at the risk and expense of the owner."

The notices were delivered to the agent of the New Jersey Lighterage Company, which had its office in the East-bound Freight House of the Erie Railway, on Long Dock, in Jersey City, and were by him put into a drawer set apart for them, and an agent of the Erie & Pacific Despatch called daily at this office and took the notices from the drawer, and went with them to the office of the White Star Line, in New York city, and obtained a permit to load the goods upon some vessel of the line, which he returned to the Lighterage Company. The agent of the latter prepared, from the way-bills of the Erie Railway Company, receipts to be signed by the steamer's officer therefor, the Lighterage Company's agent acting throughout under the direction of the Jersey City agent of the Erie Railway. The employees of the Erie Railway then loaded the goods upon the lighters, which the Lighterage Company

then towed to the steamer dock and there delivered the goods. It was the practice of the Erie Railway to deliver all ocean freights to the vessels. The Erie & Pacific Despatch neither owned nor controlled any means of conveyance from the railway dock to the steamer dock.

When the goods had been delivered to, and receipted for, by the White Star Line, the Erie & Pacific Despatch collected from the White Star Line the full amount of the inland freight in accordance with the notice and freight bill of the Erie Railway received from the Lighterage Company, and returned to the latter the notice with a check drawn by Sam. De Bow, as president of the Erie & Pacific Despatch, payable to the order of the Erie Railway Company, covering the full amount of the freight bill, with no deduction for commission or anything else. The commission account of the Erie & Pacific Despatch, as well as that of the Lighterage Company, with the Erie Railway, was settled monthly. The Lighterage Company delivered the check to the Erie Railway.

About January 20th, and February 18th, 1873, Adolphus Meier & Co., of St. Louis, Mo., made two agreements with the Erie & Pacific Despatch for the shipment of two lots of cotton, from St. Louis to Liverpool, England. These agreements were made in St. Louis, and were to the effect that the cotton was to be transported to Liverpool, for a through rate, expressed in English money, nothing being said as to what route the cotton should take from St. Louis to the seaboard; that at the time the agreements were respectively made, Meier & Co. either delivered to the agent of the Erie & Pacific Despatch the receipts of the warehouse in St. Louis, where the cotton was stored, commonly called "cotton notes," or gave an order for the cotton to such agent; that on January 22d, 1873, the Erie & Pacific Despatch gave an order to the St. Louis Transfer Co. for 567 bales of the said cotton marked V. I. C., and this lot the Transfer Co. took in their wagons across the Mississippi River to the city of East St. Louis, and there delivered it to the defend-

ant, on account of the Erie & Pacific Despatch, on the days and in the amounts as hereinafter stated.

The said Transfer Co. gave to the Erie & Pacific Despatch receipts for said two lots of cotton, and defendant receipted therefor to said Transfer Co., and by the dray tickets of said Transfer Co. said cotton was consigned by the Erie & Pacific Despatch to C. G. Meier & Co., London.

In about the usual time after the last lot of the V. I. C. cotton had been received by the Erie & Pacific Despatch, the firm of Adolphus Meier & Co. received of the said Despatch Co. a bill of lading for said V. I. C. cotton, in the words and figures hereinafter set forth:

When freight was shipped over defendant's line, by the Erie & Pacific Despatch from St. Louis, the defendant never issued bills of lading; that defendant only billed the freight to Indianapolis, and only collected and received pay for carrying the freight over its own line; that at Indianapolis it delivered the freight for further transportation to such other roads as the Erie & Pacific Despatch would then and there direct.

When on or about said 20th day of January, in the case of the V. I. C. lot, and about the 18th day of February, in the case of the P. I. G. lot, Theodore Meier, of the firm of Adolphus Meier & Co., acting for said two firms, applied to the agent of the Erie & Pacific Despatch at St. Louis for a through rate to Liverpool on the cotton, the agent telegraphed to the White Star Line at New York for the ocean rate, added that to the inland rate, and gave Mr. Meier the through rate. In each case the only conversation was as to the through rate expressed in English money. There was nothing said about any exceptions or reservations respecting the liability of the carrier or the routes to New York. Thereupon Mr. Meier delivered, as before stated, to the agent of the Erie & Pacific Despatch the warehouse receipts, commonly called "cotton notes," each representing one bale of cotton. At the time the rates were agreed upon, and the cotton notes delivered, the owners of the cotton had

no knowledge of the arrangements between the railroads, and between the Despatch and the railroads as above set forth. Mr. Meier only knew that the cotton was to go to New York, and thence by the White Star Line to Liverpool. The agent of the Erie & Pacific Despatch delivered to the Transfer Company the notes for the V. I. C. cotton, on or before January 22d, 1873, and those for the P. I. G. cotton, on or before February 19, 1873. The cotton was then taken by the Transfer Company from the warehouse, hauled to East St. Louis, and there delivered at defendant's depot. It was there way-billed and loaded upon its cars by defendant, and sent forward from East St. Louis, on defendant's road, to Indianapolis (defendant's way-bill being only to Indianapolis), and thence without change of cars to Urbana, where it was put into other cars suitable to the change of gauge, and proceeded over the Atlantic & Great Western and Erie railways to Jersey City. The consignee named, and the only one named in the way-bills of defendant or those of the Erie Railway, was C. G. Meier & Co., London, and in no case the Erie & Pacific Despatch. The V. I. C. cotton was delivered at defendant's depot on the 27th, 28th and 29th days of January, 1873, in lots of 112, 260 and 195 bales, respectively, and was sent forward from there as follows: January 29th, 390 bales; January 30th, 92 bales; and January 31st, 66 bales; February 1st, 9 bales. The P. I. G. cotton was delivered at defendant's depot on the 19th, 20th, 21st, 22d, 23d and 24th days of February, 1873, in lots of 291, 257, 196, 120, 122, 58, and 3 bales, respectively—the last two lots arriving on the 24th—and was sent forward as follows: February 20th, 393 bales; February 21st, 65 bales; February 22d, 90 bales; February 24th, 64 bales; February 25th, 223 bales; February 26th, 127 bales; February 27th, 82 bales; March 1st, 3 bales.

The face of the way-bills shows that the through rate to New York was 90 cents per hundred pounds, and that defendant's proportion thereof was $23\frac{9}{10}$ cents. The way-bills, which were not shown to the shippers, differ somewhat in

the mode of filling up the printed forms, but the following, dated January 29, 1873, is a sample:

(Form 1.)

No. 801. St. Louis, Vandalia, Terre Haute & Indianapolis Railroad.
Sheet Conductor.

Manifest of Freight, from St. Louis to Indianapolis, January 29, 1873.

Description and No. of car.	Consignor.	Consignee and destination.	No. of bags.	Description of articles.	Weight.	Rate.	Prepaid freight.	Unpaid freight.	Charges.	Total.
225.....	350	Order				23.6				
C. & C. L.	353	C. G. Meier & Co., London, Eng.	32	Bales of cotton. "V. I. C.," lot of 569.	15,360	66.4		36 25		36 25
Van.....	350	Do.	32	" " C.	15,360	90		36 25		36 25
216.....	315	Do.	32	" " "		23.6				
E. & P. D.	350	Do.	33	" " "	15,840	66.4		37 38		37 38
3625.....	335	Do.	33	" " "		23.6				
E. & P. D.	339	Do.	33	" " "	15,840	66.4		37 38		37 38
3619.....	335	Do.	33	" " "		23.6				
E. & P. D.	350	Do.	33	" " "	15,840	66.4		37 38		37 38
3015.....	335	Do.	33	" " "		23.6				
E. & P. D.	350	Do.	33	" " "	15,840	66.4		37 38		37 38
3661.....	335	Do.	33	" " "		23.6				
E. & P. D.	370	Do.	33	" " "	15,840	66.4		37 38		37 38
3008.....	335	Do.	33	" " "		23.6				
			220		100,920			259 40		259 40

Via E. & P. D.

The V. I. C. shipment began to arrive at Jersey City February 10th, and continued to do so almost daily, till March 19th, when all had arrived. The P. I. G. lot commenced arriving March 2d, and continued to do so almost daily until after the end of the month.

On the 30th day of January, 1873, in one instance, and the 28th day of February, 1873, in the other, the agent of the Erie & Pacific Despatch, at St. Louis, handed to Theodore Meier, and said Meier for said Meier & Co., received bills of lading bearing those dates, purporting to be bills of lading of the Erie & Pacific Despatch and the Oceanic Steam Navigation Company for these two lots of cotton, describ-

ing the goods, and stating the agreed rates in English money, the consignors and consignees, and the destination, and signed by the agent of the Erie & Pacific Despatch, severally, but not jointly. The bills of lading, with the special conditions and exceptions printed therein, are as follows:

[Offices of Erie and Pacific Despatch.—Sam. De Bow, manager, 365 Broadway; T. A. Lewis, western manager, Indianapolis, Ind.; C. McGivern, G. E. agent, New York; Chas. S. Austin, G. W. ag't, Peoria, Ill.; R. G. Hoyt, agent, 305 Broadway, N. Y.; N. H. McLean, agent, Cincinnati, O.; Geo. S. Brecount, agent, Louisville, Ky.; J. M. Booth, agent, Cleveland, O.; W. C. Lynn, agent, Indianapolis, Ind.; J. M. Tennis, agent, Memphis, Tenn.; Allen McCoy, agent, St. Louis, Mo.; R. K. Dunkerson, agent, Evansville, Ind.]

[Offices of the White Star Line.—J. H. Sparks, agent, 19 Broadway, N. Y.; Ismay Imrie & Co., managers, Liverpool and London. Oceanic, Celtic, Atlantic, Britannic, Baltic, Germanic, Republic, Asiatic, Adriatic, Tropic.]

Through bill of lading No. , of the Erie & Pacific Despatch, and the Oceanic Steam Navigation Co. from St. Louis to Liverpool, calling at Queenstown.

Shipped in apparent good order, by Adolphus Meier & Co., the following property, marked and numbered as per margin (contents of packages unknown, and weight subject to correction.)

Through rate, 6s 5½d gold per 100 lbs. @ 4.80 per £88 13s 6½d.

Gross weight, 278.299 lbs., and 5 per cent. primeage on ocean rate only.

Inland charges, £
£

Marks and Numbers.	Articles.
VIC (367)	Five hundred and sixty-seven bales
Order	compressed cotton.
C. G. Meier & Co.	London. Eng.

To be delivered in like good order and condition, unto C. G. MEIER & Co., Liverpool, or to their assigns, he or they paying freight, in cash, for the said goods as per margin, with primeage and average accustomed, under the following terms and conditions, viz:

That the said Erie and Pacific Despatch and its connections which receive said property shall not be liable for breakage of packages of eggs, or for rust of iron and of iron articles, or for loss or damage by wet, dirt, fire, or loss of weight, or for condition of bailing on Hay, Hemp, or Cotton; nor for loss or damage of any kind on any article whose bulk requires it to be carried on open cars; nor for damage to perishable property of any kind occasioned by delays from any cause or by changes of weather; nor for loss or damage on any article of property whatever, by fire or other casualty while in transit or while in deposit or places of transshipment, or at depots or landings at all points of delivery; nor for loss or damage by fire, collisions, or the dangers of navigation while on Seas, Rivers, Lakes, or Canals. All goods or property under this Bill of Lading will be subject, at its owner's cost, to

necessary cooerage or balling, and is to be transported to the depots of the Companies, or landings of Steamboats, or Forwarding lines at the points receipted to, for delivery.

It is further agreed that said Erie and Pacific Despatch and its connections shall not be held accountable for any damage or deficiency in packages after the same shall have been receipted for in good order by consignees, or their agents, at or by the next carrier beyond the point to which the bill of lading contracts. Consignees are to pay freight and charges upon the goods or merchandise in lots or parts of lots as they may be delivered to them.

It is further stipulated and agreed, that in case of any loss, detriment, or damage done to, or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

And it is further agreed, that the amount of the loss or damage so accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of said goods or property at the place and time of shipment under this bill of lading.

This contract is executed and accomplished, and the liability of the Erie and Pacific Despatch as common carriers thereunder, terminates on the delivery of the goods or property to the steamship at White Star Wharf, Jersey City, when the liability of the steamship Company commences, and not before.

And it is further agreed, that the property shall be transported from the port of New York to the port of Liverpool (calling at Queenstown) by the *Ocean Steam Navigation Company, limited*, subject to the following terms and conditions, viz:

To be delivered from the ship's deck, where the ship's responsibility shall cease (the acts of God, the Queen's enemies, pirates, robbers, thieves, vermin, barratry of master or mariners, restraint of princes, rulers or people, loss or damage resulting from insufficiency in strength of packages, sweating, leakage, breakage, stowage, or contact with other goods, risk of lighterage, explosion or fire at sea, in craft or on shore, before lading or after unlading, accidents from machinery, boilers, steam, or any other accidents of the seas, rivers, and steam navigation, of whatever nature or kind soever, excepted; whether any one or more of all such exceptions arise, occur, or are in any way occasioned from or by the negligence, default, or error in judgment of the masters, mariners, engineers, or others of the crew, or of any of the servants or employes of the ship owners, or otherwise however; and with liberty during the voyage to call at any port or ports to receive fuel, to load or discharge cargo, or for any other purpose whatever; to sail with or without pilots, to tow and assist vessels in all situations, and in the event of the said steamer putting back to New York, or into any other port, or being otherwise prevented from proceeding in the ordinary course of her voyage, to transship the goods by any other steamer.

Weights, contents, and value unknown, and not answerable for leakage or breakage. Freights payable in Liverpool without credit or discount upon the gross weight delivered. The goods to be taken alongside by the consignee immediately after the vessel is ready to discharge, or otherwise they will be landed by the master at the merchant's risk and expense. The collector of the port being hereby authorized to grant a general order for discharge immediately after the entry of the ship.

NOTICE.—In accepting this bill of lading the shipper, or other agent of the owner of the property carried, expressly accepts and agrees to all its stipulations, exceptions, and conditions.

In witness whereof, the agent signing for the said railway and steamship companies hath affirmed to three bills of lading of this tenor and date, one of which being accomplished, the others stand void.

Dated in St. Louis, January 30, 1873.

J. L. TRUMBULL,

For E. & P. Desp., Agents Severally, but not Jointly.

(On the margin:) Attention of shippers is called to the act of Congress of 1851: "Any person or persons shipping oil of vitriol, unslacked lime, inflammable matches, or gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering, at the time of shipment, a note in writing, expressing the nature and character of such merchandise, to the master, mate, or officer, or person in charge of the loading of the ship or vessel, shall forfeit to the United States one thousand dollars.

The bill of lading for the P. I. G. cotton, bore date "February 28th, 1873;" was signed "J. L. Trumbull, agent E. & P. Desp., agents Severally, but not Jointly;" gave the marks and numbers of the articles. "P. I. G., order C. G. Meier & Co., London, Eng., (1047) one thousand and forty-seven bales compressed cotton;" and stated the "through rates, 6s 7½d, gold per 100 lbs. @4.80 per £—gross weight, 508,693 lbs. without primage;" but in all other respects was identical with the V. I. C. bill. (Record, pages 23, 24.)

Meier & Co. had been large cotton shippers by the Erie & Pacific Despatch Company, previous to 1873, and had received many bills of lading therefor, and did, in fact, read them, so far as to see that the number of pounds and bales, and the rate and destination were correctly expressed; they received the bills of lading for the V. I. C. and P. I. G. cotton, in the usual time, and it was understood between the Despatch Company and them, when they made the agreement for the transportation of the cotton, that bills of lading for the cotton would be given to them; that they made their shipments aforesaid, by said Despatch Company, as a matter of convenience, because it was necessary to have some one to look after the cotton in New York and pay inland freight on it there; that Meier & Co. had no office or correspondent in New York, but the Erie & Pacific Despatch did have an office there, and Meier & Co. expected the Despatch Company to look after the cotton when it got there, and see that the inland charges on it were paid.

Theodore Meier, who alone of said firms had anything to do with the making of the contracts, was not aware, when

he received the bills of lading, of the special conditions or exceptions contained therein; nor was his attention drawn to them by the agent; he did not read the bills further than to see that in the written parts the description of weight, rate, destination, consignors and consignees, were correctly stated, and he never knew, nor did said firms know, that the bills contained these special provisions limiting the carrier's liability until after the loss complained of had occurred; and neither he nor said two firms ever assented to said special provisions. Mr. Meier expected to get bills of lading for the cotton, but there was no conversation on the subject, or as to the terms they should contain, nor routes to New York.

On the 21st day of March, 1873, by a fire in the Erie Railway depot, at Long Dock, Jersey City, there were destroyed 132 bales of the V. I. C., and 589 bales of the P. I. G. cotton. Of the cotton thus lost, 65 bales had arrived March 2d; 68 bales more by March 9th; and the remainder on or before March 19th.

The last of the V. I. C. cotton left East St. Louis 48 days before the fire, and the last of the P. I. G. 20 days before the fire. The ordinary time for the transit was 10 days. Some of the V. I. C. went through in 12 days, and some of the P. I. G. in 10 days from the departure from East St. Louis. The winter of 1872-3 was unusually cold and snowy, but it nowhere appears that any train or car containing any portion of this cotton was detained thereby. At Urbana the goods were transferred directly from the cars of one road to those of the other, and at Long Dock the Erie Railway trains went upon the dock itself in tracks within a few feet of where the lighters were brought to receive the cotton. On the arrival of the cotton at Jersey City it was unloaded upon the dock of the Erie Railway and left to lie there from two to nineteen days. It was not removed to, or stored in, any *public* warehouse, but was left exposed on the private dock of the Erie Railway, in a depot built of wood and with a wooden roof. The White Star Line steamers were sailing for Liverpool every Saturday, and its agents knew of the cotton being on the Erie dock, and that it was to go by their

line, needed it to fill their vessels, and made repeated demands for it, both of the agents of the Erie & Pacific Despatch and of the agents of the Erie Railway, and were refused by both.

The V. I. C. cotton began to arrive in Jersey City on February 10th, 1873; the last might have arrived, and all have been delivered by February 15, 1873, in the ordinary course of transportation. The P. I. G. cotton began to arrive on March 2d, 1873; the last might have arrived, and all have been delivered at the White Star dock, by March 13th, 1873, in ordinary course.

All the cotton embraced in said two lots was carried over the connected line of railroads, in the amended petition mentioned, to the Erie Railway long dock; and all, except that portion destroyed as aforesaid, was, by the New Jersey Lighterage Company, acting under the direction and being in the employment of the Erie Railway, carried to, and delivered at, the White Star dock, and was there received by the White Star Line and transported to Liverpool.

The weight of the 132 bales of V. I. C. cotton destroyed, was 67,031 lbs.; that of the 589 P. I. G. destroyed was 284,839 lbs. The value of the V. I. C. destroyed, on the 15th day of February, 1873, when it should have been delivered at the White Star dock, was then 19½ cents per pound, aggregating \$13,322.41; and the value of the P. I. G. cotton destroyed, on the 13th day of March, 1873, when it should all have been delivered at the White Star dock, was then 19 cents per pound, aggregating \$54,119.57.

After the loss occurred, the said Adolphus Meier & Co., and C. G. Meier & Co., for valuable consideration, assigned to plaintiff all their damages and right of action therefor against defendant and each and all the other carriers responsible therefor, the plaintiff being the insurer for Meier & Co.

Of the said cotton marked V. I. C., 435 bales were delivered at Liverpool by steamers of the Oceanic Steam Navigation Co. to the order of C. G. Meier & Co., London; and of the cotton marked P. I. G., 458 bales were likewise delivered at Liverpool by steamers of said company.

On the 21st of March, 1873, an accidental fire occurred upon the docks of the Erie Railway Co. at Jersey City, New Jersey, and by said fire 132 bales of said cotton marked V. I. C., and 589 bales of that marked P. I. G., weighing in the aggregate 351,870 pounds, were destroyed. That said cotton so destroyed was, at the time of the fire, unloaded from the cars, and was stored in the freight house of the Erie Railway Co. awaiting delivery to the steamers of the Oceanic Steam Navigation Co. That said freight house was a suitable and proper place for the storage of the cotton, and the fire occurred without fault or negligence on the part of said Erie Railway Co., and every possible exertion was made to save said cotton, and to extinguish said fire. That there were 780 bales of said Meier cotton in the said freight house, at the time of said fire, which had arrived there and been unloaded at the following dates and times respectively, to-wit:

Mark & No. of Bales.		Arrived	Unloaded	Arrived before fire.	Unloaded before fire.
P. I. G.	33.....	March 2	March 6	19 days.	15 days.
V. I. C.	32.....	" 5	" 6	16 "	15 "
P. I. G.	32.....	" 8	" 18	13 "	3 "
"	33.....	" 9	" 14	12 "	7 "
"	31.....	" 9	" 14	12 "	7 "
"	32.....	" 10	" 18	11 "	3 "
"	32.....	" 10	" 18	11 "	3 "
"	25.....	" 10	" 14	11 "	7 "
"	33.....	" 11	" 12	10 "	9 "
"	31.....	" 11	" 18	10 "	3 "
"	4.....	" 12	" 14	9 "	7 "
"	30.....	" 12	" 18	9 "	3 "
"	33.....	" 12	" 14	9 "	7 "
"	33.....	" 12	" 14	9 "	7 "
"	33.....	" 13	" 14	8 "	7 "
"	33.....	" 13	" 14	8 "	7 "
"	33.....	" 13	" 14	8 "	7 "
"	33.....	" 13	" 14	8 "	7 "
"	33.....	" 13	" 18	8 "	3 "
"	32.....	" 15	" 18	6 "	3 "
V. I. C.	33.....	" 9	" 14	12 "	7 "
"	33.....	" 9	" 14	12 "	7 "
"	2.....	" 9	" 12	12 "	9 "
P. I. G.	17.....	" 17	" 18	4 "	3 "
"	31.....	" 12	" 18	9 "	3 "
"	3.....	" 17	" 18	4 "	3 "
V. I. C.	19.....	" 19	" 20	2 "	1 "
"	31.....	" 19	" 20	2 "	1 "

And of these 780 bales, 59 were saved from the fire. That there arrived of said cotton, marked P. I. G., on March 20th, 1873, 53 bales, which had not been unloaded and were not burned; and that there arrived subsequent to March 21, 1873, to-wit: between March 22d and 28th, both inclusive, 221 bales of said cotton marked P. I. G. That immediately upon the arrival of each car of said cotton at the Erie freight house, notices of such arrival were served upon the agents of the Erie & Pacific Despatch in New York, which notices were in the words and figures hereinbefore set forth. That the cotton which reached Jersey City was not delivered to the steamship, because the Erie & Pacific Despatch failed to get from the Oceanic Steam Navigation Co. the necessary permits, and to order a delivery of the cotton to said last named company.

According to the custom of doing business in New York, which has prevailed for more than ten years previous to 1873, no freight would be received at the dock of the steamship company, to be loaded on one of its vessels, unless accompanied by a permit from the freight agent of the line. In accordance with this custom and mode of doing business, it was necessary for the Erie Railway Co. to have a permit, as aforesaid, before any of the Meier cotton could be delivered and received at the White Star Dock, and it was the uniform practice for the Erie and Pacific Despatch, when freight was shipped by said company, or to its care, or on its account, to obtain permits for such freights as they desired delivered at said White Star Dock, and send said permit, with the notice of arrival of such cotton as it desired shipped, as an order to the Erie Railway Co. to deliver the cotton mentioned in such notice to the steamship designated in the permit, and the Erie Railway Co. delivered said cotton to said White Star Dock immediately upon the receipt of such order.

The agent of the Oceanic Steam Navigation Co., commonly known as the White Star Line, endeavored to get this Meier cotton delivered by demanding it of the agent of

the Erie & Pacific Despatch, but that company failed to deliver it.

In all cases of freight, ocean bound, coming from the west over the Erie Railway, shipped by the Erie & Pacific Despatch, or consigned care of Erie & Pacific Despatch, the Erie Railway Company treated the Despatch Company as the consignee in New York, and held the freight subject to the order of the Despatch Company. The Erie Railway Co. were ready and able to deliver the said Meier cotton as it arrived.

The Erie & Pacific Despatch was a corporation organized under the laws of Kansas, and engaged in the business of soliciting and forwarding freight, with offices in St. Louis, Indianapolis and New York, separate and distinct from the offices of the railroad companies; it owned no railroad, but had arrangements with different railroads to haul the freight obtained by it over their respective lines; it had also arrangements with all the steamship lines out of New York, including the White Star Line, whereby it could issue a joint bill of lading for freights going from points distant from the seaboard to foreign ports; in January and February, 1873, its freights from St. Louis to New York were transported sometimes over defendant's line, sometimes over the Ohio & Mississippi Railroad, the Pan Handle Railroad, the Cincinnati, Hamilton & Indianapolis Railroad, the Atlantic and Great Western Railroad, and the Erie Railway, as the Despatch Co. directed, in the absence of any route prescribed by the shipper.

Upon the foregoing facts, the court declared the law to be, that the plaintiff was not entitled to recover, and gave judgment for the defendant. (Record, page 28.)

The plaintiff thereupon moved the court to set aside the judgment and grant a new trial, which motion was overruled and a bill of exceptions filed, and the plaintiff then sued out a writ of error to remove the cause to this court. (Record pages 28, 29.)

Upon the issues and the above Special Finding arise the following

QUESTIONS:

- 1st. Was the Erie & Pacific Despatch defendant's agent?
- 2d. What were the contracts of shipment?—Were they contracts to carry *through*, or only to the end of defendant's own line? And were the contracts oral and without limitation of the carrier's liability; or as set out in the bills of lading containing such limitations?
- 3d. Was defendant liable because of negligent delay in the transportation, even if the bills of lading were the contract?
- 4th. Were the goods still in transit under defendant's contracts at the time of the loss?

ASSIGNMENT OF ERRORS.

The plaintiff alleges that the circuit court erred—

- 1st. In giving judgment upon the above special finding of facts, in favor of the defendant, when the judgment should have been in favor of the plaintiff thereon.
- 2d. In overruling plaintiff's motion for a new trial.

The plaintiff in error maintains that:

I. THE ERIE & PACIFIC DESPATCH WAS DEFENDANT'S AGENT.

II. THE CONTRACTS OF SHIPMENT WERE THROUGH CONTRACTS, BINDING THE DEFENDANT TO CARRY THE GOODS BEYOND ITS OWN LINE.

III. THE CONTRACTS WERE ORAL, AND CONTAINED NO LIMITATION OF THE CARRIER'S LIABILITY; AND CONVERSELY, THE BILLS OF LADING WERE NOT THE CONTRACTS BETWEEN THE PARTIES.

IV. WHETHER THE BILLS OF LADING CONSTITUTED THE CONTRACTS BETWEEN THE PARTIES OR NOT, THE DEFENDANT IS LIABLE, BECAUSE OF THE NEGLIGENT AND WRONGFUL DELAY IN THE TRANSPORTATION.

V. THE GOODS WERE STILL IN TRANSIT AT THE TIME OF THE LOSS.

VI. JUDGMENT SHOULD HAVE BEEN RENDERED FOR THE PLAINTIFF, INSTEAD OF FOR THE DEFENDANT.

ARGUMENT.

I.

THE ERIE & PACIFIC DESPATCH WAS DEFENDANT'S AGENT.

In plaintiff's view, the Despatch was at one and the same time the agent of the four roads mentioned in the amended petition, which were connected together as one line, for the purposes of through business procured by the Despatch.

The facts bearing upon this issue, and set forth in the special finding, are substantially as follows: (Record pages 12-17, 23, 24, 27, 28.)

In 1873, the defendant operated a line of road from East St. Louis to Indianapolis; the Pittsburgh, Cincinnati & St. Louis Railway Company operated a line from Indianapolis to Urbana; the Atlantic & Great Western Railway Company, from Urbana to Salamanca; and the Erie Railway Company, from Salamanca to Jersey City;—the roads all being common carriers. The Erie Railway Company, by means of barges which it owned or employed, carried goods from its depot at Long Dock, Jersey City, to New York City, and to steamers in the harbor, for the latter purpose employing the New Jersey Lighterage Company. Upon shipments from East St. Louis to Jersey City by these roads, re-shipment was necessary at Urbana, because the gauge of defendant's road and that of the P. C. & St. L. R. R., though the same with each other, differed from that

of the A. & Gt. W. Ry., and that of the Erie Railway. There was at St. Louis a corporation called the Transfer Company, whose business was to haul goods from St. Louis to the various railroad depots in East St. Louis, including defendant's. The Oceanic Steam Navigation Company, or White Star Line, was a steamer line plying between New York and Liverpool. The Erie & Pacific Despatch was a Kansas corporation, whose business was to solicit and forward freights. There were several trunk lines between St. Louis and New York, besides the one above mentioned.

The several trunk lines, in 1873, and for years before, had an arrangement between themselves whereby the general freight agents of the roads terminating at St. Louis made a joint tariff to New York, fixing through rates, which were divided among the roads constituting a through line, according to an estimate of the distance the goods were carried by each road, upon the basis of the shortest line. Losses were as between the roads themselves, pro-rated, if not located; if located, were paid by the road on which they occurred. (Record, page 13.)

These lines published such a tariff in October, 1872, which continued in force till after the loss complained of in this case occurred. The defendant, by its general freight agent, H. W. Hibbard, signed this tariff, which was put into the hands of the agents of the railroads for their guidance in making contracts, *and was also distributed to shippers and the public generally.* It is entitled, "JOINT RATES OF TRANSPORTATION FROM ST. LOUIS VIA," sundry roads, including defendant's; and it fixes the "*all rail rates in cents per hundred pounds on compressed cotton from St. Louis and Belleville, to New York*" at 90 cents. (Record, pages 13-14.)

Arrangements were effected between the E. & P. Despatch and sundry railroads having connections terminating in New York, under which the Despatch was empowered to contract for the transportation of goods according to the tariff rates, or any special rates furnished by the roads, *the roads agreeing to carry the goods so contracted for to their*

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proper destination. The Despatch agreed to, and did, establish offices and agencies in St. Louis and New York; and to solicit and secure business, and so take care of it that other competing lines could not get it away—all lines running into New York other than those with which the Despatch had an arrangement being competing lines. The Despatch could make no contract, or fix any rate for the carriage of goods over defendant's road, except as authorized by defendant. The Despatch had such agreements with the four railroads named in the amended petition, including defendant; and a large amount of business was done over this line and defendant's road thereunder. (Record, page 14.)

On the arrival of E. & P. Despatch shipments at Indianapolis, they were sometimes sent forward, as ordered by the Despatch, over the P. C. & St. L. R. R., and sometimes by the Indianapolis & Junction R. R., to the intersection of the A. & Gt. W. R'y, and thence by the latter and the Erie Railway to New York.

The E. & P. Despatch had a separate agreement with each of the railroads constituting the through line, in some instances oral, and in others in writing; the former being the case with defendant's contract, the latter with that of the Erie Railway Co.

In all cases, when a through rate was contracted for, the several railroads of the connecting line participated therein according to the aforesaid arrangement for pro-rating through freights with each other. The railroads collected the freights from the consignees, divided it amongst themselves, and paid to the E. & P. Despatch for its services so much per cent. on the gross freights for "pound freight," and 60 cents a bale on cotton, each road settling separately with the Despatch for its dues.

The written contract with the Erie Railway is set out in the finding in full. (Record, pages 15-16.) By the 3d section, the Despatch was bound to establish and maintain efficient agencies for soliciting and procuring freight. By the 4th section, the Erie Railway was bound to receive, load and

unload, deliver and way-bill, and furnish the Despatch daily an impression copy of each and every way-bill free of charge.

By the 7th section the Despatch was bound to maintain the authorized rates of the Erie Railway. By the 8th section, it was "agreed that in consideration of the mutual benefits to be derived by the parties hereto," the Erie Railway should pay to the Despatch "*a commission*" of specified percentages on east bound and west bound freight between New York and certain named cities, including St. Louis.

"The agreement between the defendant company and the said Despatch, though oral, was in substance the same as the aforesaid agreement with the Erie Railway Company." (Record, page 16.)

On all shipments from St. Louis to New York by the line composed of the four roads mentioned in the amended petition, the defendant paid the transfer charges from St. Louis to East St. Louis, and the Erie Railway paid the lighterage, whether the goods were to go to New York proper, or were foreign bound, and these transfer and lighterage charges were included in the through rate named by defendant. On all shipments from New York to St. Louis by this line the defendant collected the freight money from the consignees, and retaining its proportion accounted for the residue to the next road in the line, which, in like manner, deducted its share and accounted in the same way to the next, and so on to the beginning of the line. On shipments from St. Louis to New York City proper, the Erie Railway collected the freight from the consignees, and, in like manner, settled with the next preceding carrier, and so on in the inverse order of the transportation to the first carrier. These settlements between the roads were made periodically, upon accountings between them. (Record, pages 16-17.)

The Erie & Pacific Despatch had an arrangement with the White Star Line, by which the Despatch could contract for shipments from New York to Liverpool at rates given by the steamer line, the latter agreeing to receive the goods

at their dock in Jersey City and to transport them to Liverpool, but the Despatch had no power to bind the steamer line for any risks incurred in the inland transportation. The White Star Line paid the Despatch no commission or other compensation—their remuneration was obtained exclusively from the railroads under the arrangements above set forth. (Record, page 17.)

On through shipments from St. Louis to Liverpool the Despatch contracted for a through rate in this way: They applied to H. W. Hibbard, defendant's general freight agent for the inland rate—that is, all rail rate—including lighterage and transfer charges as aforesaid; or they took it from the published tariff, though the agents of the fast freight lines, of which the Despatch was one, were in the habit of applying to Mr. Hibbard for special rates. *The inland rate furnished by defendant* was added to the ocean rate given by the White Star Line, and this sum constituted the through rate to Liverpool at which the Despatch contracted with the shipper. In no case did the Despatch charge any greater through freight than the sum of the ocean and inland freights thus furnished. (Record, page 17.)

On the arrival at Jersey City of goods bound to Liverpool, under Erie & Pacific Despatch bills of lading, or marked or way-billed as Erie & Pacific Despatch shipments, the usual course of business was this: Notices of the arrival of the goods, the same in form as given to ordinary consignees, were made out and signed by the railroad agent, informing the E. & P. Despatch of the arrival, the amount of freight and charges; that a failure to remove the goods in a reasonable time would be construed as an assent to the company's storing them in a suitable *public store or warehouse*; and requiring *all checks to be made payable to the Erie Railway*; and stating that if the consignee should, within twenty-four hours, inform the Erie Railway alongside of what vessel he desired the freight delivered, *the company would make the delivery*; and if such notice should not be given in twenty-four hours, the

freight would be warehoused at the risk and expense of the owner. (See form of notice, Record, pages 17-18.)

The notices were delivered to the agent of the New Jersey Lighterage Co., which had its office in the east bound freight house of the Erie Railway, on Long Dock, Jersey City, and were by him put into a drawer set apart for them, and an agent of the Erie & Pacific Despatch called daily at this office and took them from the drawer, and went with them to the office of the White Star Line in New York City, and obtained a permit to load the goods upon some vessel of the line, which he returned to the Lighterage Co. *The agent of the latter prepared from the way-bills of the Erie Railway receipts to be signed by the steamer's officer therefor, the Lighterage Company's Agent, acting throughout under the direction of the Jersey City agent of the Erie Railway. The employees of the Erie Railway then loaded the goods upon the lighters, which the Lighterage Company then towed to the steamer dock and there delivered the goods. It was the practice of the Erie Railway to deliver all ocean freights to the vessels. The E. & P. Despatch neither owned nor controlled any means of conveyance from the railway dock to the steamer dock.* (Record, pages 18, 19, 27.)

When the goods had been delivered to, and receipted for, by the White Star Line, the E. & P. Despatch collected from the White Star Line the full amount of the inland freight, in accordance with the notice *and freight bill of the Erie Railway received from the Lighterage Co.*, and returned to the latter the notice, with a check drawn by the President of the E. & P. Despatch, payable to the order of the Erie Railway Co., covering the full amount of the freight bill, with no deduction for commission or anything else. The Lighterage Co. delivered the check to the Erie Railway. The commission account of the Despatch, as well as that of the Lighterage Co. with the Erie Railway, was settled monthly. (Record, page 19.)

When freight was shipped over defendant's line by the E.

& P. Despatch from St. Louis, the defendant never issued bills of lading; the defendant only billed the freight to Indianapolis, and only collected and received pay for carrying the freight over its own line. At Indianapolis it delivered the freight for further transportation to such other road as the E. & P. Despatch would then and there direct. (Record, page 19.)

In all cases of freight ocean bound, coming over the Erie Railway, shipped by the Erie & Pacific Despatch, or consigned care of Erie & Pacific Despatch, the Erie Railway treated the Despatch Co. as consignee in New York, and held the freight subject to the order of the Despatch Co.

The E. & P. Despatch was a Kansas corporation, and engaged in the business of soliciting and forwarding freight, with offices in St. Louis, Indianapolis and New York, separate and distinct from the offices of the railroad companies; it owned no railroad, but had arrangements with the different railroads to haul the freight obtained by it over their respective lines; it had also arrangements with all the steamship lines out of New York, including the White Star Line, whereby it could issue a joint bill of lading for freight going from points distant from the seaboard to foreign ports; in January and February, 1873, its freights from St. Louis to New York were transported sometimes over defendant's line, sometimes over the Ohio & Mississippi Railroad, the Pan Handle Railroad, the Cincinnati, Hamilton & Indianapolis Railroad, the Atlantic & Great Western Railroad and the Erie Railway, as the Despatch Co. directed, in the absence of any routes prescribed by the shipper. (Record, page 28.)

It is submitted that if the above facts do not constitute the Erie & Pacific Despatch the agent of the several railroads named, including defendant, it is difficult to conceive what would have that effect.

1st. The Erie & Pacific Despatch performed valuable services to the railroads constituting the line in question. It

"solicited and took care of the business so that other competing lines running into New York could not get it away from them;" and "the competing lines were all the lines running into New York other than those with which the E & P. Despatch had an arrangement." Here is a plain agency—a labor to perform at the instance and for the benefit of a principal—to solicit, contract and take care of the business; and this service it was employed to do by oral or written contracts.

2d. The E. & P. Despatch could make no rate or contract over defendant's road, except as authorized by defendant. It was bound to maintain the tariff rates of the Erie road. The only through rate east that it could give was one prescribed by defendant.

Upon the through rate so prescribed, the Erie & Pacific Despatch was authorized to make contracts with shippers, and the railroads were bound to accept and transport the goods. It is of no consequence whether there was any other connecting line of railroads between St. Louis and New York than that of the four roads mentioned, by which the E. & P. Despatch was also authorized to make such contracts; the only matter of importance is, were they so authorized by this line? The E. & P. Despatch may very well have been agent at one and the same time for many lines.

3d. On all Erie & Pacific Despatch shipments from New York to St. Louis by this line, the Vandalia Railroad collected the freight from the consignees, and not from the E. & P. Despatch. The freight was not charged to the Despatch. No account whatever was kept with them except as to commissions.

On all Erie & Pacific Despatch shipments from St. Louis to New York City the Erie Railway collected the freight from the consignees, and not from the Erie & Pacific Despatch. These two last mentioned facts prove con-

clusively that at neither end of the line was the E. & P. Despatch treated as consignee or consignor, or in any sense responsible for the charges. If as between the Despatch and the railroads, the goods are freight of the E. & P. Despatch, surely the Despatch would be chargeable at one end or the other of the line.

Upon all Erie & Pacific Despatch shipments from St. Louis to New York foreign bound, the Erie & Pacific Despatch collected the freight bills from the steamer line upon bills made out by the Erie Railway, not by the Despatch, and it paid it over in gross to the Erie Railway as money belonging to that company. True it went through the hands of the Lighterage Company, but this was a mere conduit. The Despatch was thus a mere agency of the Erie Railway to collect the money from the steamer line, as the Lighterage Company was to collect on "inspection freights."

It was the usage of the defendant to give bills of lading to ordinary shippers, but never to the Erie & Pacific Despatch. This is a fact totally unexplained, except on the theory that the E. & P. Despatch was an agent of defendant, and uniformly so considered.

4th. For the services performed, the line paid the Erie & Pacific Despatch a commission. It is of as little consequence how they paid the commission as how they divided the freight money. A gross commission was paid; and each member of the line settling severally paid the same proportion as it received of the freight. Here was a joint understanding as to the freight and its division, and a joint understanding as to proportions and amount of commissions. Of what avail is it to the defendant to urge that it only made a separate agreement with the E. & P. Despatch as to how much it was to pay, and was in no respect bound for the proportions the other members of the line were to pay. Such separate agreement, if admitted, was based upon, indeed formed part of the common understanding. Such considerations might be of serious import, if the controversy were one

between the members of the line, or between the line and the Despatch, its agent, but can in no way affect third parties dealing with either.

5th. The Despatch was not a common carrier. It owned no cars or railroad. It never had the actual possession of goods. The Transfer Company, at St. Louis hauled the goods to East St. Louis to defendant's depot, and was paid by defendant therefor. The Lighterage Co., at Jersey City, under direction and pay of the Erie Railway, carried the goods from the railway dock to the steamer dock, and took the steamer company's receipt therefor. But even if the Despatch were shown to have actually handled and had custody of the goods on the route, the state of the case as established by the other facts would not be altered. In order to change its character from a railroad agent to that of a shipper over the roads, like an express company, it would be essential to show that it paid for the privilege—hired the carriage; but, on the contrary, it was paid for its services.

6th. Although the court finds (Record, page 28) that in cases of freight, ocean bound, coming from the West over the Erie Railway, shipped by the Erie & Pacific Despatch, or consigned care of Erie & Pacific Despatch, the Erie Railway treated the Despatch as the consignee in New York, and held the freight subject to the order of the Despatch Company—this can mean no more than that, for the purpose of giving the notice of arrival (Record, pages 17-18), and as a convenient mode of transacting its business, the Erie Railway chose to deal with the Despatch as with an ordinary consignee. But the finding (Record, page 20) shows that the Erie Railway, in an important particular, did not treat the Despatch as consignee. Referring to the cotton in this case, it says that the consignee named in the way-bills of defendant, or those of the Erie Railway, was G. G. Meier & Co., London, and in no case the Erie Pacific Despatch. The real relations between the Railway and Despatch are defined

by the written contract (Record, pages 15-16), which constitutes the Despatch an agent of the Railway "for soliciting and procuring freight," entitled to "commissions" for its services, and daily copies of way-bills to expedite its labors, restricted it to the Railway's tariff of rates, but guaranteed that the road would recognize its contracts in accordance with those rates. The special finding declares that "the agreement between the defendant and the Despatch, though oral, was in substance the same as the agreement with the Erie Railway Co." It is, therefore, immaterial how the Erie Railway Co. or the defendant chose to *treat* the Despatch. The agreement goes below appearances and mere presumptions, and defines the real relations as those of principal and agent.

7th. The finding says that Meier & Co. made their shipments by the Despatch, as a matter of convenience, because it was necessary to have some one to look after the cotton in New York, and pay inland freight on it there; that Meier & Co. had no office or correspondent in New York, but the Despatch did have an office there; and Meier & Co. expected the Despatch to look after the cotton when it got there, and see that the inland charges on it were paid. (Record, page 25.)

Whatever effect this finding would have, if it stood alone, it can have none when viewed in connection with the other facts. Meier & Co. knew nothing of the relations of the Erie & Pacific Despatch to the railroads, or of the railroads to each other. (Record, page 20.) The Despatch was not to *pay* the freight in New York. The White Star Line did that. The Despatch merely collected the Erie Railway's freight bill from the Steamer Line, and turned over the money to the Erie Railway. (Record, page 19.) It acted in this particular simply as collecting agent of the Erie Railway. The Despatch being a fast freight line (Record, page 17), authorized by the railroads and steamships to make through contracts to Europe, was of course under obligations to its principals to

do whatever was needful at New York or elsewhere, in order that the goods might promptly reach their destination. Shippers had the same right to expect that it would do its duty, as that an engineer or conductor would. Common carriers and all their subordinate agencies, are used by shippers, "as a matter of convenience." How these facts can vary the relations or the rights of the parties, in the present case, it is difficult to perceive.

In fine, the Despatch was not owner, consignor or consignee of goods. It was not charged with freight by the railroads, but was paid a commission by them. It was not paid by the shippers or consignees, but by the carriers. It was not directed or controlled in the performance of its duties by the shippers, but by the railroads. It had neither roads, cars nor actual custody of the goods. It was a mere soliciting agency of the railroads, by whose interposition at connecting points, like Indianapolis, Urbana and Jersey City, the transit could be hastened and the roads be enabled to hold out inducements to shippers grounded on the promise of rapid transportation.

This Court, in *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 182, have defined the characteristics of an agent. The Court say: "The railroad company in transporting the messenger of defendants, and the express matter in his charge, was the agent of somebody; either of the express company, or of the shipper or consignees of the property. That it was the agent of the defendants is quite clear. *It was employed by them and paid by them.* The service it was called upon to perform was a service for the defendants."

In the same case (page 185) the Court referred to such agencies as the Erie & Pacific Despatch in the following language:

"We cannot close our eyes to the well-known course of business in the country. Over very many of our railroads the contracts for transportation of goods are made, not

with the owners of the roads, nor with the railroad companies themselves, *but with transportation agencies or companies which have arrangements with the railroad companies for the carriage.* In this manner some of the responsibilities of common carriage are often sought to be evaded; but in vain."

In the case at bar, the Despatch Company—a mere hollow shell—is authorized by the railroads to make contracts, of which they reap the benefits till disaster happens, when they seek to shield themselves behind its empty name.

An agent is "one who acts in the place and stead of another, and the agency may be proved by evidence direct or indirect. It is indirectly established by evidence of the relative situation of the parties, or of their habits and course of dealing, or of the nature of the employment, or from subsequent ratification."

2 Greenl. Ev., Secs. 59, 60.

The facts above set forth would seem to establish the agency in question by overwhelming evidence, both direct and indirect.

II.

THE CONTRACTS OF SHIPMENT WERE THROUGH CONTRACTS, BINDING THE DEFENDANT TO CARRY THE GOODS BEYOND ITS OWN LINE.

The defendant's answer admits that there was a through contract. It sets up the bills of lading, which are on their face through contracts, but claims they are the contracts of the Erie & Pacific Despatch, and not its own. It also relies upon the fire clause in the bills of lading. If the plaintiff is correct in claiming that the facts found by the court constitute the Erie & Pacific Despatch defendant's agent, then in one aspect of the case the question would be narrowed to the inquiry as to whether or not the bills of lading express the contracts of shipment.

Under the facts found, the four roads named in the amended petition constituted a connecting line. They were to all intents and purposes partners.

The above recited facts from the special finding, show:

1st. The several railroads named had an arrangement among themselves that goods shipped over them on a through contract from St. Louis to New York, would be carried by them over their respective roads and delivered at the terminus. Now, it is doubtless true that the eastern and western terminal roads of this line also carried goods passing between the same points and over other roads than the intermediate ones mentioned in the petition, and also starting at either terminal point over other than these, the Erie Railway and the Vandalia. But this in nowise affects the fact that these four named roads had such an arrangement among themselves, out of which grew certain legal rights and liabilities which are in no respect limited by relations existing between these roads and others.

2d. The price at which goods shipped over this particular line should be carried was fixed by the initial road; that is, on shipments from New York to St. Louis by the Erie Railway, and on shipments from St. Louis to New York by the Vandalia Railroad; and the price so fixed was acquiesced in by all the roads constituting the line. This fact is nowise affected in its legal aspects by the question whether the Vandalia made a through rate, or indeed the same through rate from St. Louis to New York by a line composed with itself of other roads than those of this line, or the Erie Railway made a rate westward over other lines. The stubborn fact remains that the Vandalia gave a through rate by this line by virtue of an understanding with the several roads composing it.

3d. The through rate so given was, by an understanding existing for several years between the several roads com-

posing the line, divided amongst the members in fixed proportions, based upon an arbitrary adjustment of the relative length of carriage. This division was something with which shippers had nothing to do. They were only interested in the through rate, and the legal rights founded thereon. It was a matter of no consequence either, by what process of accounting or paying the roads settled between themselves. The legal result is the same, whether they came together at stated periods and made a division of freight moneys heaped in a mass before them, or whether they adjusted their affairs by a system of mutual charges and credits, or whether they respectively collected and received their proportion of the freight from the road next immediately succeeding, upon periodic accountings. The fact remains that the four railroads divided amongst themselves the gross through freight according to a mutual agreement. It is stated in the special finding (Record, page 19), that on Erie & Pacific Despatch shipments over defendant's line, "defendant only billed the freight to Indianapolis, and only collected and received pay for carrying the freight over its own line." But this collection is fully explained (Record, pages 13, 17, 19), by the fact that the Erie Railway collected the freight on goods going to New York or beyond, and accounted to the defendant for its share, whilst the defendant collected the freight on goods to St. Louis and accounted to the Erie for its share, according to the agreed proportions. The way bills were not shown to shippers; (Record, page 20), and however they may have been filled out for convenience of the defendant, they can in no way restrict the shipper's rights as determined by the other facts of the case.

4th. The defendant held itself out to the world as contracting on cotton through to New York. It joined with other trunk lines in issuing the joint tariff of October, 1872, (Record, pp. 13-14), by which it gave a through rate to New York of 90 cents per hundred on cotton, and this it put into the hands of its agents, and "*distributed to shippers and the public generally.*" It also, as above stated, authorized the

Despatch to make through contracts at rates given by itself. By joining in and distributing said joint tariff, by authorizing and recognizing the contracts of the Despatch, under which "a large amount of business was done over this line and defendant's road" (Record, page 14), the defendant held itself out to the world as making through contracts by the Despatch.

In *R. R. Co. v. Pratt*, 22 Wall., page 123, this Court say: "In *Root v. Gt. Western* (45 N. Y., 524), in speaking of the contract to transport as a common carrier over other lines, the Court say: 'Such an understanding may be established by express contract, or by showing that the *company held itself out as a carrier for the entire distance*, or other circumstances indicating an understanding that it was to convey through.'"

It will probably be conceded that if several railroads connect with each other, and goods are delivered to the road at one end of the line to be carried to the other end, and the road receives them and agrees for their carriage through at a fixed price paid or to be paid, the road so receiving is liable for a loss occurring anywhere on the route. To this point authorities are superabundant.

In the case of the *Nashua Lock Co. v. Worcester & Nashua Railway*, 48 N. H. 339, the Court say: "Where several common carriers are associated in a continuous line of transportation, and in the course of the business goods are carried through the connected line for one price, under an agreement by which the freight money is divided among the associated carriers in proportions fixed by the agreement; if the carrier at one end of the line receives goods to be transported through, marked for a consignee at the other end of the line, and on delivery of the goods takes pay for transportation through, the carrier who so receives the goods is bound to carry them, or see that they are carried to their final destination, and is liable for an accidental loss happening in any part of the connected line."

Railroad v. Pratt, 22 Wall. 123.
Wheeler v. San F. & Alameda R. R., 31 Cal. 46.
Weed v. Sar. & Sch. R. R., 19 Wend. 534.
F. & M. Bank v. Champlain Trans. Co., 23 Vt. 186.
Noyes v. Rutland & Bur. R. R., 27 Vt. 110.
Kyle v. Laurens R. R., 10 Rich. (S. C.) 382.
Angle v. Miss. & M. R. R., 9 Iowa, 488.
Schroeder v. Hudson River R. R., 5 Duer. 61.
Hart v. Rens. & Sar. R. R., 4 Seld. 37.
Perkins v. Port. & Saco R. R., 47 Me. 573.
Champion v. Bostwick, 11 Wend. 571.
s. c., 18 Id. 174.
McDonald v. Western R. R., 34 N. Y. 501, 502.
Cin., Ham. & Dayton R. R. v. Speat, 2 Duvall, 4.
Barter & Wheeler, 49 N. H. 9.
Coates v. U. S. Express Co., 45 Mo. 238.
Fairchild v. Slocum, 19 Wend. 329.
Root v. Great Western R. R., 45 N. Y. 524.
Redfield on Railways (2d Ed.), 288.
2 Redf. Ry. Cas. 280, 318.
2 Pars. Cont. (5th Ed.) 212-218.

The facts as to the contracts of shipment in the present case, as found by the Court, are as follows (Record, page 19): "About January 20th and February 18th, 1873, Adolphus Meier & Co. of St. Louis, Mo., made two agreements with the Erie & Pacific Despatch for the shipment of two lots of cotton from St. Louis to Liverpool, England. *These agreements were made in St. Louis, and were to the effect that the cotton was to be transported to Liverpool for a through rate expressed in English money, nothing being said as to what route the cotton should take from St. Louis to the seaboard; that at the time the agreements were respectively made, Meier & Co. either delivered to the agent of the Erie & Pacific Despatch the receipts of the warehouse in St. Louis where the cotton was stored, commonly called 'cotton notes,' or gave an order for the cotton to*

such agent; that on January 23, 1873, the Erie & Pacific Despatch gave an order to the St. Louis Transfer Co. for 567 bales of the said cotton, marked V. I. C., and this lot the Transfer Co. took on their wagons across the Mississippi River to the City of East St. Louis, and there delivered it to the defendant on account of the Erie & Pacific Despatch, on the days and in the amounts hereinafter stated.

"The said Transfer Company gave to the Erie & Pacific Despatch receipts for said two lots of cotton, and defendant receipted therefor to said Transfer Company, and by the dray tickets of said Transfer Company said cotton was consigned by the Erie & Pacific Despatch to C. G. Meier & Co., London.

"In about the usual time after the last of the V. I. C. cotton had been received by the Erie & Pacific Despatch, the firm of Adolphus Meier & Co. received of the said Despatch Company a bill of lading for said V. I. C. cotton, a copy of which is set out in the finding. (Record, page 21.)

"When, on or about the said 20th day of January, in the case of the V. I. C. lot, and about the 18th day of February, in the case of the P. I. G. lot, Theodore Meier, of the firm of Adolphus Meier & Co., acting for said two firms, applied to the agent of the Erie & Pacific Despatch at St. Louis for a through rate to Liverpool on the cotton, the agent telegraphed to the White Star Line at New York for the ocean rate, added that to the inland rate, and gave Mr. Meier the through rate. *In each case, the only conversation was as to the through rate expressed in English money. There was nothing said about any exceptions or reservations respecting the liability of the carrier or routes to New York.* Thereupon Mr. Meier delivered, as before stated, to the agent of the Erie & Pacific Despatch, the warehouse receipts, commonly called "cotton notes," each representing one bale of cotton. At the time the rates were agreed upon, and the notes delivered, the owners of the cotton had no knowledge of the arrangements between the railroads, and between the Despatch and the railroads as above set forth. Mr. Meier

only knew that the cotton was to go to New York, and thence by the White Star Line to Liverpool. The agent of the Erie & Pacific Despatch delivered to the Transfer Company the notes for the V. I. C. cotton, on or before January 22, 1873, and those for the P. I. G. cotton on or before February 19, 1873. The cotton was then taken by the Transfer Company from the warehouse, hauled to East St. Louis, and there delivered at defendant's depot. It was there way-billed and loaded upon its cars by defendant, and sent forward from East St. Louis, on defendant's road, to Indianapolis (defendant's way-bill being only to Indianapolis), *and thence without change of cars to Urbana*, where it was put into other cars suitable to the change of gauge, and proceeded over the Atlantic & Great Western and Erie Railways to Jersey City. *The consignee named, and the only one named in the way-bills of defendant or those of the Erie Railway, was C. G. Meier & Co., London, and in no case the Erie & Pacific Despatch.* The V. I. C. cotton was delivered at defendant's depot on the 27th, 28th and 29th days of January, 1873, in lots of 112, 260 and 195 bales, respectively, and was sent forward from there as follows: Jan. 29th, 390 bales; Jan. 30th, 92 bales; Jan. 31st, 66 bales; Feb. 1st, 19 bales. The P. I. G. cotton was delivered at defendant's depot on the 19th, 20th, 21st, 22d, 23d and 24th days of February, 1873, in lots of 291, 257, 196, 120, 122, 58 and 3 bales, respectively—the last two lots arriving on the 24th—and was sent forward as follows: Feb. 20th, 393 bales; Feb. 21st, 65 bales; Feb. 22d, 90 bales; Feb. 24th, 64 bales; Feb. 25th, 223 bales; Feb. 26th, 127 bales; Feb. 27th, 82 bales; March 1st, 3 bales.

"The face of the way-bills show that the through rate to New York was 90 cents per hundred pounds, and that defendant's proportion thereof was 23 6-10 cents. The way-bills were not shown to the shippers." They were marked via Erie & Pacific Despatch.

"On the 30th day of January, 1873, in one instance, and the 28th day of February, 1873, in the other, the agent of the

Erie & Pacific Despatch, at St. Louis, handed to Theodore Meier, and said Meier, for said Meier & Co., received bills of lading bearing those dates, purporting to be the bills of lading of the Erie & Pacific Despatch and the Oceanic Steam Navigation Company for these two lots of cotton, describing the goods, and stating the agreed rates in English money, the consignors and consignees, and the destination, and signed by the agent of the Erie & Pacific Despatch, severally but not jointly. The bills of lading, with the special conditions and exceptions printed therein, are set out in the Record at pages 21-24. They contained general exemptions from liability for loss by fire. (Record, page 21.)

"Meier & Co. had been large cotton shippers by the Erie & Pacific Despatch previous to 1873, and had received many bills of lading therefor, and did, in fact, read them so far as to see that the number of pounds and bales, the rate and destination, were correctly expressed; they received the bills of lading for the V. I. C. and P. I. G. cotton in the usual time; and it was understood between the Despatch Company and them, when they made the agreement for the transportation of the cotton, that bills of lading for the cotton would be given to them; that they made their shipments aforesaid by said Despatch Company, as a matter of convenience, because it was necessary to have some one to look after the cotton in New York and pay inland freight on it there; that Meier & Co. had no office or correspondent in New York, but the Erie & Pacific Despatch did have an office there; and Meier & Co. expected the Despatch Company to look after the cotton when it got there, and see that the inland charges were paid.

"Theodore Meier, who alone of said two firms had anything to do with the making of the contracts, *was not aware, when he received the bills of lading, of the special conditions or exceptions contained therein; nor was his attention drawn to them by the agent*; he did not read the bills further than to see that in the written parts the description, rate, weight, destination, consignors and consignees were correctly stated;

and he never knew, nor did said firms know, that the bills contained these special provisions, limiting the carrier's liability until after the loss complained of had occurred; and neither he nor said two firms ever assented to said special provisions. Mr. Meier expected to get bills of lading for the cotton, but there was no conversation on the subject or as to the terms they should contain, nor routes to New York." (Record, page 25.)

On these facts it is difficult to see how it can be denied that the contracts were *through* contracts. Indeed, the finding distinctly declares that they were such. The language used, is: "These agreements were made in St. Louis, and were to the effect that the cotton was to *be transported to Liverpool for a through rate*, expressed in English money." (Record, page 19.) The reference is not to the bills of lading, but to the original oral agreements. The bills of lading were not delivered till about ten days afterwards.

Again, a through rate at 90 cents per hundred pounds was named by the Vandalia Railroad, upon which the E. & P. Despatch made a contract with the shipper. The rate given included the transfer at St. Louis, which the defendant was chargeable with and paid, and the lighterage at Jersey City from the Erie Docks to White Star Docks, which the Erie was chargeable with and paid on all the goods actually delivered. The cotton notes went into the hands of an employee of the defendant—the St. Louis Transfer Co.,—which received the cotton at St. Louis, carried it to East St. Louis, where it was received and loaded on defendant's cars, and from that time till its destruction never went into the care or custody of the Erie & Pacific Despatch. *It passed in defendant's cars beyond Indianapolis*, and was only transferred from them at Urbana, because of a change of gauge.

R. R. Co. v. Pratt, 22 Wall. 123, is in many respects a parallel case. In that case this Court, after stating (page 129), that "The fair result of the American cases limits the carrier's liability as such, when no special contract is made, to

his own line" (on page 131), say: "This evidence shows that the oral agreement was to carry his horses to Boston, not to carry to Rouse's Point and thence to forward to Boston, but to carry as well and as fully over the Vermont and Massachusetts roads as over the Ogdensburg road.

"Again, a specific price was agreed upon for transportation over the whole route. This was in accordance with the practice, and whether paid at Potsdam or at Boston was unimportant. This practice had been continued for years, and the jury had a right to hold the contract to be the same, without reference to pre-payment or post-payment. The jury were justified in inferring that when a carrier fixes a price for transportation over the whole route, that he makes the entire contract his own. One who carries simply over his own line, and thence forwards by other lines, would, ordinarily, the jury may say, make and collect his own charges and leave the remaining charges to be collected by those performing the remaining service. Receipt of the entire pay affords a fair presumption of an entire contract."

"In *Root v. Great Western* (45 N. Y., 524), in speaking of the contract to transport as a common carrier over other lines, the Court say: 'Such an undertaking may be established by express contract, or by showing that the company held itself out as a carrier for the entire distance, or received freight for the entire distance, or other circumstances indicating an understanding that it was to carry through.'"

In *G. & B. Sewing Mach. Co. v. Mo. Pacific R. R. Co.*, 70 Mo., 672, it is held, that a railroad company may be bound by contract, express or implied, to transport persons or property beyond the line of its own road—the Court adopting the principle declared in *R. R. v. Pratt*, 22 Wall. 124, and in *Lock Co. v. Railroad*, 48 N. H., 355.

"Where carriers on connecting routes form associations and arrangements for the purpose of carrying goods or parcels through the whole line, and share the profits, they are, beyond question, partners, and each is responsible for any

loss or injury to goods which may happen in whatever part of the line it occurs."

Coates v. U. S. Express Co., 45 Mo. 238.

"Receipt of payment for the whole route would be evidence going far to prove such undertaking." Id.

"It may be regarded as equally well settled, upon authority, that if several common carriers, having each its own line, associate and form what to the shipper is a continuous line, and contract to carry goods through, for an agreed price, which the shipper or consignee pays in one sum, and which the carriers divide among them, then, as to third parties with whom they contract, they are liable jointly for a loss taking place on any part of the line."

Wyman v. Chicago & Alton R. R. Co., 4 Mo. App. 35, 39.

A through rate implies a through contract. It may be considered as established that the acceptance by the carrier of the goods to be carried to a point beyond his own line, for a price named by him for the entire distance, implies a contract to carry through, and makes the first carrier liable for all losses happening by the fault of the connecting roads, they being his agents.

It is immaterial whether the freight be prepaid to the first carrier or paid to the last carrier on delivery of the goods.

R. R. v. Pratt, 22 Wall. 120.

Barter v. Wheeler, 49 N. H. 9.

2 Redf. R. Cas. 319.

III.

THE CONTRACTS WERE ORAL, AND CONTAINED NO LIMITATIONS OF THE CARRIER'S LIABILITY; AND CONVERSELY, THE BILLS OF LADING WERE NOT THE CONTRACTS BETWEEN THE PARTIES.

On this point the facts are very simple, and have all been recited above.

Mr. Meier inquired of the agent of the Erie & Pacific Despatch for a through rate in each instance to Liverpool. The agent gave him a through rate by adding the ocean rate given by the White Star Line to the inland rate named by defendant. The rate was expressed in English money. The only conversation was as to the rate in English money. Mr. Meier expected to get a bill of lading, but nothing was said about it, much less about its terms. The rate thus expressed being agreed to, Mr. Meier delivered the cotton notes to the agent of the Despatch, who delivered them to the Transfer Co., which got the cotton and took it to East St. Louis. The rights of the parties were then fixed.

Eight days after the delivery to the Transfer Co. of the V. I. C. cotton notes, and nine days after the delivery of the P. I. G. cotton notes to said Company, the agent of the Erie & Pacific Despatch handed to Mr. Meier the bills of lading containing exceptions against loss by fire, and other important modifications of the rights and liabilities of the parties, but the agent did not call Mr. Meier's attention to these exceptions; Mr. Meier did not know of their existence; did not assent or agree to them; and never knew that they were in the bills till after the loss; he only examined the bills to see that the description, rate, consignors, consignees and destination were correct; and finding these right, accepted the bills without dissent. One day before the time he received the V. I. C. bill of lading, 390 bales of his cotton had actually been sent forward from East St. Louis on defendant's road. When he received the P. I. G. bill of lading his cotton had been going forward from East St. Louis on defendant's road for eight days; and, in fact, all but three bales out of 1,047 had gone forward as early as the day before.

From these facts, the defendant would have the Court imply an assent of the shipper to the terms of these bills; bind him in favor of the common carrier to their stringent

terms; set aside the agreement made when the shipper parted with his property; and overthrow the obligations with which the law has surrounded the public calling of the common carrier. No one can doubt that Mr. Meier might have refused to receive these bills of lading, because they did not express the bargains made. But it is argued that by receiving them without dissent he accepted the terms, though ignorant of them, and waived his rights already fixed by the oral contracts, and the acceptance by the carrier of his goods subject to all the responsibilities annexed by law to its calling.

One answer to this argument would seem sufficient; that is, that there was no consideration whatever for such waiver; and it was so ruled by the Supreme Court of Kansas in one case where the shipper actually signed a release of certain liabilities after his cattle were in the cars.

Kansas Pacific R. R. v. Reynolds, 17 Kansas, 251.

But there are two well settled propositions of law which effectually dispose of this defense.

1. A carrier's common law liability can only be limited by *express contract*. There is no such thing as *implied assent* of the shipper where the duties of a common carrier are concerned.

2. If the shipper has parted with his goods on the oral contract before the bill of lading containing other conditions is given him, he is not in a position to dissent from the terms of the bill of lading, and his assent thereto cannot be presumed.

1. A carrier's common law liability can only be limited by *express contract*. There is no such thing as *implied assent* of the shipper where the duties of a common carrier are concerned.

"The clear weight of authority is, that sound principles of public policy demand that the common carrier should be

held strictly to his common law liability, unless it is limited by *express agreement*, and that the principles of law which create obligations *ex contractu*, by *implied or constructive assent*, have no application to contracts limiting the liability of a common carrier."

Gaines v. Union Transp. Co., 28 Ohio, 418.

This Court have adopted the same view and expressed it in most energetic language. In the case in question a receipt was given by the carrier to the shipper at the time of shipment, and accepted by him without dissent. It contained a clause that the transportation was to be subject to certain regulations of the company endorsed on the back of the receipt. The Court held the shipper not bound by these limitations because he had not expressly agreed to them and his assent could not be implied.

The Court say, "If any implication is to be indulged from the delivery of the goods under a general notice, it is as strong that the owner intended to insist upon his rights and the duties of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an *express stipulation* by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment.

"The considerations against the relaxation of the common law responsibility by public advertisements, *apply with equal force to notices having the same object, attached to receipts given by carriers on taking the property of those who employ them into their possession for transportation*. Both are attempts to obtain, by indirection, exemption from burdens imposed in the interests of trade upon this particular business.

"It is not only against the policy of the law, but a serious injury to commerce, to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be general to the public or special to a particular person, merely because he does not expressly

dissent from them. If the parties were on an equality in their dealings with each other, there might be some show of reason for assuming acquiescence from silence, but in the nature of the case this equality does not exist, and therefore *every intendment should be made in favor of the shipper when he takes a receipt for his property, with restrictive conditions annexed*, and says nothing, that he intends to rely upon the law for the security of his rights.

"It can readily be seen, if the carrier can reduce his liability in the way proposed, he can transact business on any terms he chooses to prescribe. The shipper, as a general thing, is not in a condition to contend with him as to terms, nor to await the result of an action at law in case of refusal to carry unconditionally. Indeed, such an action is seldom resorted to, on account of the inability of the shipper to delay sending his goods forward. The law in conceding to carriers the ability to obtain any reasonable qualification of their responsibility *by express contract, has gone as far in this direction as public policy will allow*. To relax still further the strict rules of common law applicable to them, *by presuming acquiescence in the conditions on which they propose to carry freight when they have no right to impose them, would, in our opinion, work great harm to the business community.*"

Railroad v. Manuf. Co., 16 Wall. 318, 329.

N. J. Steam Nav. Co. v. Mer. Bank, 6 How. 344.

In the case of the Railroad v. Manfg. Co. quoted from above, the paper called a receipt had every element of a contract possessed by a bill of lading. It was signed by the railroad agent, and in the body of it distinctly stated that the goods were to be carried subject to the regulations printed on the back. The loss was such that if the regulations thus incorporated were binding upon the shipper, the carrier would have been excused. An important feature of the case was that the receipt was delivered to the shipper when the carrier received the goods. Some Courts have

held that the acceptance by the shipper at the time of the delivery of his goods of a receipt or bill of lading qualifying the liabilities of the carrier, was conclusive of the shipper's assent to the terms of the receipt or bill of lading, and he could not be heard to dispute the fact of his understanding the instrument and agreeing to its provisions. But this Court in the case quoted have proclaimed a wiser doctrine, and established a safer rule of law. Indeed, the Court quotes with approval a recent statute of Michigan, which provides that no railroad shall be permitted to limit its common law liability as a common carrier in any manner whatsoever, except by a written contract, no part whereof shall be in print, and that signed by the shipper.

For the purposes of this case and in this Court, the decision of the case of the *Railroad v. Manuf. Co.* and the reasons therefor assigned, are conclusive. The Supreme Court of Illinois, in a recent case, has expressed the same views. In *Boskowitz v. Adams Express Co.* (93 Ills. 523), which also was a case of the delivery of the bill of lading containing special limitations simultaneously with the delivery of the goods, the court declared that the proof must be clear that the shipper knew and agreed to these limitations.

The law itself annexes certain liabilities to the employment of the common carrier; it requires no contract to create them, but a contract is necessary to discharge them. Hence, persons employing common carriers may confidently rely upon their legal rights, and cannot be forced against their will, or tricked by indirection, into a waiver of the guarantees which the law has assured to them. The carrier has no right to throw off his obligations; he can only be relieved of them by the express agreement of his employer. "A public officer or servant who has a monopoly in his department, has no just right to impose onerous and unreasonable conditions upon those who are compelled to employ him."

Railroad v. Lockwood, 17 Wall. 357, 382.

To the effect that assent to the limitations of the carrier's liability must be clearly shown, see also,

- Parker v. S. E. R. R. 25 W. R. 97.
Jones v. Voorhees, 10 O. 145.
Moses v. R. R. Co., 24 N. H. 71; 32 Id. 523.
Brown v. E. R. R. Co., 11 Cusb. 97.
Adams v. Buckland, 97 Mass. 124.
Perry v. Thompson, 98 Mass. 249.
Gaines v. Union Transp. Co., 28 O. St. 418.
Kansas Pa. R. R. v. Reynolds, 17 Kansas, 251.
Southern Express Co. v. Moore, 39 Miss. 822.
Adams Express Co. v. Haynes, 42 Ills. 89.
Adams Express Co. v. Stetaners, 61 Ills. 184.
Illinois Cent. R. R. v. Frankenburg, 54 Ills. 88, 98.
Am. Exp. Co. v. Shier, 55 Ills. 140, 150.
Levering v. U. Trans. Co. 42 Mo. 91.

In the case of Adams v. Buckland (97 Mass. 124), the Court say: "It is settled that assent is not necessarily to be inferred from the mere fact that knowledge of such notice (*i. e.*, limiting the liability of the carrier) on the part of the owner or consignee is shown. The evidence must go further, and be sufficient to show that the terms upon which the carrier proposed to carry the goods were adopted as the contract between the parties, according to which the service was to be rendered." And in the same case the Court say that "the assent must be clear and unequivocal." This view of the law is quoted and approved by the Supreme Court of Maine in Fillebrown v. G. T. Railway, 55 Me. 468:

"Where a traveler, on delivery of baggage to a local express company, receives a paper, which, from the circumstances of the transaction, he has a right to regard simply as a receipt or voucher to enable him to follow and identify his property, and no notice is given to him that it embodies the terms of a special contract, or is intended to subserve any other purpose than as a voucher, his omission to read

the paper is not *per se* negligence, and he is not, as matter of law, bound by its terms.

"The question whether, in a particular case, the party receiving such a receipt accepted it with notice of its contents, or with notice that it contained the terms of a special contract, so as to require him to acquaint himself with its contents, is one of evidence to be determined by the jury."

Madden v. Sherard, 73 N. Y. 329.

There may be some room for dispute on the authorities as to whether assent can be implied from the acceptance by the shipper of a conditional receipt simultaneously with the delivery of the goods to the carrier; though in this Court that is not an open question since the decision of the Railroad v. Manuf. Co. 16 Wall. 318. But where the conditional receipt is not given to the shipper till after he has parted with the goods under an oral contract, there is no controversy upon any class of authorities that the assent cannot be implied from the acceptance of the receipt.

2. If the shipper has parted with his goods on the oral contract before the bill of lading containing other conditions is given him, he is not in a position to dissent from the terms of the bill of lading, and his assent thereto cannot be presumed.

In Bostwick v. B. & O. R. R. Co. 45 N. Y. 712, the plaintiff contracted with the agent of a line of railroads, of which defendant formed a part, for the carriage of 54 bales of cotton from Cincinnati to New York, "all rail," and agreed to pay "all rail rate," which was more than rail and water rate; the entire freight to be paid in New York. After making this contract, plaintiff delivered the cotton at the depot, and took depot receipts, and sent these receipts to the agent's office to obtain bills of lading. The agent did not deliver any bill of lading at the time, but one or two days afterward sent to plaintiff's office a bill of lading signed by himself, as

agent of the line, for the 54 bales. The cotton had, at that time, been shipped.

The cotton was conveyed to Baltimore by rail, and there shipped on steamers to New York, and 16 bales were lost at sea by the wrecking of the vessel.

Defendant claimed exemption by virtue of conditions printed in the bill of lading, to the effect that each company should only be liable for losses occurring to the goods whilst in its own possession; and that none of the companies should be liable for loss or damage by the dangers of navigation while on the sea, lakes or rivers; and that by accepting the bill of lading the shipper assented to its terms. The plaintiff's attention was not drawn to the printed conditions.

The trial court directed a *non suit*; the Court of Appeals reversed the judgment.

The court say, "There was no contradiction attempted of the evidence of the plaintiff that he made a verbal contract with Cooke (the agent) for the transportation of the 54 bales through to New York by 'all rail,' and agreed to pay the all rail rate. The goods were shipped under this verbal agreement before any written contract or bill of lading had been tendered to the plaintiff.

"The verbal agreement had been acted upon, and under it the plaintiff had parted with all control over his goods. The rule that prior negotiations are merged in a subsequent written contract does not apply to such a case as this.

"If the plaintiff had expressly assented to the terms of the bill of lading subsequently delivered to him, such assent would operate as a change of the terms of the contract originally made, and under which he had parted with his property. But after the verbal agreement had been consummated, and rights had accrued under it, the mere receipt of the bill of lading, inadvertently omitting to examine the printed conditions, was not sufficient to conclude the plaintiff from showing what the actual agreement was under which the goods had been shipped.

"In the case of *Corey v. N. Y. Cent. R. R. Co.*, decided in April, 1871, not reported, we held that conditions contained in a bill of lading, not delivered until after the shipment and loss of the goods, though before the loss was known, did not control the rights of the shippers.

"The present case is analogous in principle to the one cited.

"The goods having been shipped under an agreement that they should be carried all rail, a loss occasioned by their being carried by sea is no excuse for their non-delivery to the plaintiff."

To the same effect is *Gott v. Dinsmore*, 100 Mass. 45, where the bill of lading was delivered after a loss of the goods; the Court expressly putting the decision that the bill of lading was not binding, on the ground that it was not given concurrently with the delivery of the goods.

In *Lamb v. Camden and Amboy R. R. Co.*, 4 Daly, 483, plaintiffs agreed with a common carrier of freight for the transportation of certain bales of cotton at a specified rate of freight. At the time the agreement was made no bills of lading or shippers' receipts were given by the carrier, but after the goods had been shipped, receipts were sent to the shippers containing a clause exempting the carrier from liability for loss by fire, but this clause was not brought to the notice of the shippers until after the cotton had been destroyed by fire. *Held*, that the carrier was liable for the loss.

This case was twice tried. In the first instance the plaintiff declared upon the bills of lading and had judgment (2 Daly, 454), but this was reversed by the Court of Appeals, (46 N. Y., 271); for an erroneous instruction as to burden of proof. The plaintiff then filed an amended petition setting up an oral contract, and recovered judgment, which was affirmed by the General Term, and reported, 4 Daly, 483. This judgment was not appealed from.

On the last trial it appeared that the cotton was at Cairo, Ills., in charge of Mr. Halliday, for putting it in order and

"W., the agent of a fast freight line carrying property from Nashville to New York, in June, 1864, applies to G., of said city, for the shipment of cotton, and states that his line is the quickest and safest and *all rail*; and upon that statement, G., by his agent, R., agrees to ship 39 bales of cotton from Nashville for New York; and the cotton is received by the said fast freight line early next day under said verbal agreement, nothing being then or previously said about conditions or restricted liability. In the afternoon of the next day, after W. had possession of the cotton, bills of lading, full of restrictions upon said liability, were handed to R., G.'s agent, but nothing was said as to the character of such restrictions or conditions. These were received without objection, and without reading, were sent to the consignee who used them to claim part of the cotton not destroyed.

"*Held*: When a carrier claims exemption from common law liability, under a bill of lading not signed by the owner or consignor of the goods, he must aver and prove that such bill was assented to by the shipper.

"Whether such assent has been given, so as to make the bill of lading binding on the shipper, is a fact to be proved, *and can not be implied or presumed contrary to the facts*, when the acts of the shipper do not operate as an estoppel.

"Where plaintiff's evidence tended to prove that the goods were shipped under a previous verbal agreement, without special exemptions in favor of the carrier, and that after the goods were in transit the bill of lading containing such exemptions was handed to the shipper, who, without examination or objection, forwarded it to the consignee, who made use of the same to receive and sell the goods not lost, and accounted to the shipper for the proceeds. *Held*: That it was error to charge the jury that such acts of the consignor and consignee were conclusive on the former, and bound him by the conditions named in the bill, where it appears he had no knowledge of such conditions, and never in fact assented to them."

The Court say: "Where there was a previous verbal contract with a common carrier, as to the terms of the carriage under which the goods were delivered, followed by bills of lading with restrictions not embraced in the verbal contract, the plaintiff might rely on his previous contract, unless the contents of the bill were brought to his knowledge and assented to before the goods had gone beyond his control." *Id.*, page 435.

"No estoppel was pleaded or relied on by defendant, nor did the facts warrant the application of that doctrine." *Id.*, page 437.

"Where a common carrier, who has received and undertaken to carry the goods of another, seeks, in an action against him, to limit his common law liability as such, *the burden is on him to establish the special agreement limiting such liability.*" *Id.*, page 438.

Referring to *Grace v. Adams*, 100 Mass. 505; and *Kirkland v. Dinsmore*, 62 N. Y. 171:

"They were cases where there was no claim of a previous verbal contract under which the carrier took possession of the goods to be carried. They were cases where the delivery of the goods and the bills of lading were concurrent acts, and not, as here, bills delivered *after* shipment. These we think are material facts affecting the rule.

"The clear weight of authority is, that sound principles of public policy demand that the common carrier should be held strictly to his common law liability unless it is limited by *express* agreement, and that the principles of law which create obligations *ex contractu* by an *implied promise* or *constructive assent*, have no application to contracts limiting the liability of a common carrier." *Id.*, page 440.

"The language of the Ohio decisions is, that the carrier may limit his liability by *special agreement*. This excludes the idea that there may be an *implied agreement* where there is none expressed." *Id.*, page 440.

"The principle adopted in Ohio, and steadily adhered to, that the common law liability of the carrier can be limited

by special agreement only, is supported both by reason and authority."

"That there should be an *express assent* to limitations of a carrier's liability is decided in the following cases: *Adams' Ex. Co. v. Nock*, 2 Duvall, 563; *Express Co. v. Moon*, 39 Miss. 832; *Levering v. Union Trans. Co.*, 42 Mo. 94; *Adams' Ex. v. Haynes*, 42 Ill. 93; *Adams' Ex. Co. v. Stellaners*, 61 Ill. 186; *R. R. Co. v. Manfg. Co.* 16 Wall, 329, and numerous other cases." *Id.*, page 441.

"In the absence of proof to the contrary, we apprehend the presumption of law is, that the shipper relies on his common law rights, and that that presumption can only be removed by evidence showing that he has assented to limitations of those rights." *Id.*, pages 442-3.

"Where no such assent is thus proven, it cannot be presumed or implied from acts of the shipper which do not amount to an estoppel in pais. These goods had been delivered to the carrier before the bills were handed to the shipper. Whatever may be the presumptions that arise where the goods and bills are delivered concurrently, it is clear that none would arise unfavorable to the shipper in the case at bar, especially when he is claiming under a previous verbal agreement, unless he knew of the terms of the bills, and then the inference to be drawn would be more or less affected by circumstances.

"Public policy demands that a common carrier should be held to his common law liability, except when there is a special qualification clearly and fairly made.

"It would be dangerous to the public interest to allow the carrier to conclude the shipper by implication of law, in face of the fact, showing he had no knowledge of the terms of the qualification and never assented to them, and where they are used merely to obtain possession of the goods not destroyed.

"This would create a contract by presumption or operation of law, and not by the assent of the parties." *Id.*, 443.

It may be supposed that the case of *York Co. v. Central Railroad*, 3 Wall, 107, militates against the views above set

forth. But in that case the point involved here did not and could not arise. That case turned on the authority of the agent of the owner to bind the latter, the agent shipping the goods in his own name without disclosing his principal. The question whether a bill of lading delivered after a shipment under an oral contract, was obligatory, was not considered or passed on in the court above or the court below. Indeed, it could not have any weight, because, though the bill of lading was delivered subsequent to the shipment, yet it conformed to the oral contract. The plaintiff's testimony in chief showed that "*the contract of shipment was in form of a bill of lading.*"

But it may be urged that as Meier & Co. had before been large shippers of cotton by the Despatch, and had had bills of lading therefor, they must be presumed to have known and agreed to the terms of the bills of lading in this case. This, however, is to substitute presumption for the positive finding of the court, which is that they did not "know that the bills contained these provisions limiting the liability of the carriers, until after the loss complained of occurred," and that they never "assented to said special provisions." Previous dealings between the parties might be competent evidence to satisfy the court that the shippers did know and assent to the limitations; but in this case it did not satisfy the court of such fact, and the court found the contrary to be true. And though the court finds that Meier & Co. had previously received bills of lading from the Erie & Pacific Despatch, there is no finding, or anything to show what the terms thereof were, much less that they were identical, or even similar to the bills of lading now in question. For all that appears, the previous bills of lading may have contained no conditions or limitations whatever restricting the carrier's legal liability; and this is fairly to be inferred from the positive finding of the court that Meier & Co. never assented to the special reservations or restrictions of the bills of lading. Mr. Meier expected to get bills of lading, and it was the

understanding he should have them, "but there was no conversation on the subject, or as to the terms they should contain." (Record, p. 25.)

Surely, if the burden of proof is on the carrier to show *express* assent of the shipper to the terms of the bills of lading, there is a total failure to make such proof here, where the bills were not delivered for from eight to ten days after the shipper had parted with his goods, and it is not shown that any such bills had ever before come under his notice, but it is expressly found as a fact that he never knew of the special conditions, and that he never agreed thereto. It is true the Court finds that the bills were delivered in about the usual time, but nevertheless the goods had gone into the hands of the carrier, and it was out of the power of the consignors to dissent from the terms if they had even been aware of them. To infer an express contract waiving the shipper's rights, from facts such as these, is not only to substitute presumption, but the flimsiest kind of presumption, in place of the express assent which the law demands, and also to destroy thereby the distinct finding that the consignors never assented to the special provisions of the bills.

A much stronger case was made for the defence on this point in *Michigan Central R. R. Co. v. Boyd*, 91 Ill., page 268, but the Court held it insufficient.

"This suit was brought by appellee against appellant in the court below to recover for certain goods delivered to the latter to be carried for the former, and which were destroyed by the Chicago fire. The finding and judgment below were in favor of appellee. The bill of lading contained stipulations relieving the company from responsibility for loss by fire while in station or in transit. Scholfeld, J.: "The contract for the carriage of the goods having been made in Massachusetts, the law of that state must control as to its nature, interpretation and effect. *Penn. Co. v. Fairchild*, 69 Ill. 261; *Milwaukee, etc. R. R. Co. v. Smith*, 74 Id. 197. The

law of Massachusetts is by the stipulation to be accepted as stated in the opinion of the Supreme Court of that state in *Grace v. Adams*, 100 Mass. 505; and *Hoadley v. Northern Trans. Co.* 115 Id. 304. It is: 'A bill of lading or shipping receipt, taken by a consignor without dissent at the time of the delivery of the property for transportation, by the terms of which the carrier stipulates against such liability (i. e., the liability of a carrier, in the absence of a special contract, under the common law) would exempt the carrier when the loss was not caused by his own negligence, on the ground that such acceptance would authorize him to infer assent and amount to evidence of the contract between the parties.' It will be observed this requires that the bill of lading or shipping receipt should be taken by the consignor without dissent at the time of the delivery of the property for transportation. But the bill of lading here relied on as showing an exemption was not accepted by the consignor at the time of the delivery of the property for transportation. The stipulation is, that within a few days after the goods were delivered for transportation, 'and after said goods were on their way, upon the presentation of the dray receipt for the goods, and at the request of the consignors, the bill of lading was delivered.' This we cannot regard as the equivalent of a bill of lading at the time of the delivery of the property for transportation. It does not appear when this bill of lading was delivered that the consignor had any authority to bind the consignees by any contract in regard to the goods. The goods had then passed entirely beyond their control. And inasmuch as it is the act of accepting the bill of lading without dissent which creates the presumption of assent to its terms, it follows that the consignor must at the time have been acting as the agent of the consignee to bind him. An agent, after the termination of his agency, can do no act which can relate back to and become evidence of a contract made by him whilst he was agent."

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"Prior to 2d day of October, 1871, said consignors, Wellington Bros., had been in the habit of shipping goods in the same manner as the goods in controversy were shipped, and of receiving for all such shipments *bills of lading similar in import to the one hereto attached*, without their attention having been particularly directed to the conditions or restrictions of said bills of lading pertaining thereto, and that said plaintiffs had at several times before the shipment of the goods in controversy, received goods at Lincoln, Ill., aforesaid, at said several times, from the same consignors and over the same line of road, *and under bills of lading similar to the one hereto attached*, without their attention having been called to the particular terms of said bills of lading." (Page 269.)

The opinion on these facts concludes thus:

"We are furnished with no authority that, under the law of Massachusetts the evidence of prior shipments and the acceptance of like bills of lading by the same consignors, qualified as it is by the fact that their attention was never called to the exemptions and restrictions in the bill of lading, is sufficient to raise the presumption that the parties intended these goods were to be carried subject to the exemptions and restrictions of this bill of lading, *and in our opinion*, such presumption should not follow." (Page 272.)

It is plain, therefore, that Meier & Co. never in fact or in law agreed to the terms of the bills of lading, but the defendant, either severally or jointly with the other roads constituting the line, did by its agent agree to carry the goods through under oral contracts, and got possession of the goods thereunder.

The common law, therefore, defines the defendant's liability.

It is provided by statute in Missouri, that "All contracts which by the common law are joint only shall be construed to be joint and several." (1 Wag. Stat., page 269, § 1.)

It matters not, for the present purpose, whether or not the defendant undertook jointly with other lines to carry the goods through, or whether the Despatch was a joint contractor with the railroads, or only an agent for them.

The Despatch having contracted as agent without disclosing its principal, the plaintiff has a right to resort to the principal.

Ford v. Williams, 21 How. 287.

N. J. Steam Nav. Co. v. Merch. Bank, 6 How. 381.

Ruiz v. Norton, 4 Cal. 355.

Story on Agency, 160a.

IV.

WHETHER THE BILLS OF LADING CONSTITUTED THE CONTRACTS BETWEEN THE PARTIES OR NOT, THE DEFENDANT IS LIABLE BECAUSE OF THE NEGLIGENT AND WRONGFUL DELAY IN THE TRANSPORTATION.

"On the 21st day of March, 1873, by a fire in the Erie Railway depot, at Long Dock, Jersey City, there were destroyed 132 bales of the V. I. C. cotton, and 589 bales of the P. I. G. cotton. Of the cotton thus lost, 65 bales had arrived March 2d; 68 bales more by March 9th, and the remainder on or before March 19th.

"The last of the V. I. C. cotton left East St. Louis 48 days before the fire, and the last of the P. I. G. 20 days before the fire. *The ordinary time for the transit was 10 days.* Some of the V. I. C. went through in 12 days, and some of the P. I. G. in 10 days, from the departure from East St. Louis. The winter of 1872-3 was unusually cold and snowy, but it *nowhere appears that any train or car containing any portion of this cotton was detained thereby.* At Urbana the goods were transferred directly from the cars of one road to those of the other, and at Long Dock the Erie Railway trains went upon the dock itself in tracks within a few feet of where

the lighters were brought to receive the cotton. On the arrival of the cotton at Jersey City, it was unloaded upon the dock of the Erie Railway, and left to lie there from two to nineteen days. It was not removed to, or stored in, any public warehouse, but was left exposed on the private dock of the Erie Railway in a depot built of wood, and with a wooden roof. The White Star Line steamers were sailing for Liverpool every Saturday, and its agents knew of the cotton being on the Erie dock, and that it was to go by their line, needed it to fill their vessels, and made repeated demands for it, both of the agents of the Erie & Pacific Despatch, and of the agents of the Erie Railway, and were refused by both. The V. I. C. cotton began to arrive in Jersey City, February 10th, 1873; the last might have arrived and all have been delivered by February 15, 1873, in the ordinary course of transportation. The P. I. G. cotton began to arrive on March 1st, 1873; the last might have arrived and all have been delivered at the White Star Dock by March 13th, 1873, in ordinary course. All the cotton embraced in said two lots was carried over the connected line of railroads, in the amended petition mentioned, to the Erie Railway Long Dock; and all, except that portion destroyed as aforesaid, was, by the New Jersey Lighterage Co., acting under the direction and being in the employment of the Erie Railway, carried to, and delivered at, the White Star dock, and was there received by the White Star Line and transported to Liverpool.

"The value of the V. I. C. cotton destroyed on the 15th day of February, 1873, when it should have been delivered at the White Star Dock, was 19 7-8 cents per pound, aggregating \$13,322.41; and the value of the P. I. G. cotton destroyed on the 13th day of March, 1873, when it should all have been delivered at the White Star Dock, was then 19 cents per pound, aggregating \$54,119.57." (Record, pages 25-26.)

"On the 21st of March, 1873, an accidental fire occurred upon the docks of the Erie Railway Co. at Jersey City, and by said fire 132 bales of said cotton, marked V. I. C., and 589 bales of that marked P. I. G., weighing in the aggregate

351,870 pounds, were destroyed. That said cotton so destroyed was, at the time of the fire, unloaded from the cars, and was stored in the freight house of the Erie Railway Company, awaiting delivery to the steamers of the Oceanic Steam Navigation Co. That said freight house was a suitable and proper place for the storage of the cotton, and the fire occurred without fault or negligence on the part of the Erie Railway Co., and every possible exertion was made to save said cotton, and to extinguish said fire. That there were 780 bales of said Meier cotton in the said freight house at the time of said fire, which had arrived there and been unloaded at the following dates and times respectively:” (Here follows tabulated statement, giving dates of arrival and unloading, showing the arrivals to have ranged from two to nineteen days before the fire, and the unloading from one to fifteen days.) (Record, pages 26-27.)

“That immediately upon the arrival of each car of said cotton at the Erie freight house, notices of such arrival were served upon the agents of the Erie & Pacific Despatch in New York, which notices were in the words and figures hereinbefore set forth. That the cotton which reached Jersey City was not delivered to the steamship, because the Erie & Pacific Despatch failed to get from the Oceanic Steam Navigation Co. the necessary permits, and to order a delivery of the cotton to the said last named company.

“According to the custom of doing business in New York, which had prevailed for more than ten years previous to 1873, no freight would be received at the dock of the steamship company, to be loaded on one of its vessels, unless accompanied by a permit from the freight agent of the line. In accordance with this custom and mode of doing business, it was necessary for the Erie Railway Co. to have a permit, as aforesaid, before any of the Meier cotton could be delivered and received at the White Star docks, and it was the uniform practice for the Erie & Pacific Despatch, when freight was shipped by said company, or to its care, or on its account, to obtain permits for such freights as they desired

delivered at said White Star Docks, and send said permit, with the notice of the arrival of such cotton as it desired shipped, as an order to the Erie Railway Co. to deliver the cotton mentioned in such notice to the steamship designated in the permit, and the Erie Railway Co. delivered said cotton to said White Star dock immediately upon the receipt of such order.

"The agent of the Oceanic Steam navigation Co., commonly known as the White Star Line, endeavored to get this Meier cotton delivered by demanding it of the agent of the Erie & Pacific Despatch, but that company failed to deliver it. (Record, pages 27-28.)

The above finding excuses the carriers with respect to the character of the warehouse, the cause of the fire, and the efforts to extinguish it and save the cotton. But in every other particular it finds them guilty of the grossest and most inexcusable negligence and breach of duty. The court finds that ten days was the usual time of transit, and that all of the V. I. C. cotton ought in ordinary course of transportation to have been delivered at the White Star Dock by February 15, 1873—34 days before the fire—and assesses its value on that day; and finds that all of the P. I. G. cotton ought to have been delivered in regular course by March 13th, 1873—8 days before the fire—and assesses its value as of that date. The court finds that there was nothing to show that the hard winter had anything to do with the detention, and that there was emphatically no excuse for it.

In *Pruitt v. Han. & St. Joe. R. R. Co.*, 62 Mo. 527, 544, the Court say, that a delay of 25 days in one case, and of 41 days in another, "might be termed *prima facie* negligence, inexcusable unless by the total cessation of all business by the company for the public."

The V. I. C. cotton notes were delivered to the Erie & Pacific Despatch 58 days, and those of the P. I. G. 39 days before the fire; the whole of the former had left East St.

Louis 48 days, and the whole of the latter 20 days before the fire. The first of the V. I. C. was forwarded from East St. Louis 51 days, and the first of the P. I. G. 29 days, before the fire, the ordinary time of transit being but 10 days. (Record, page 20.) Of the P. I. G. 221 bales arrived subsequent to the fire (Record, page 27), and that which was destroyed therefore must have been part of the earliest to depart from East St. Louis.

If the shipments were made under oral contracts, without limitation of the carrier's liability, the negligent delay in transportation is immaterial to fix defendant's liability. But if there was such delay, and this contributed to the loss, the defendant would be liable, even though the bills of lading were held to be the contracts between the parties. The carrier cannot by contract excuse himself from losses caused by his negligence.

N. J. Steam Nav. Co. v. Merch. Bank, 6 How. 344.

Bank of Kentucky v. Adams' Ex. Co., 93 U. S. 114.

The burden of proof is on the carrier to bring himself within the exceptions allowed by law or inserted in the contract.

Clark v. Barnwell, 12 How. 278, 280.

Clark v. St. L., K. C. & N. R. R. Co., 61 Mo. 140.

Read v. St. L., K. C. & N. R. R. Co., 60 Mo. 199.

Ketchum v. Am. U. Exp. Co. 52 Mo. 390.

If the cotton had been carried through and delivered promptly, it would not have been caught in the fire.

But on this point we are met with the cases of Railroad v. Reeves, 10 Wall. 176; Morrison v. Davis, 20 Penn. St. 171; and Denny v. N. Y. Cent. R. R. Co., 13 Gray, 481, holding that where there had been delay in transportation, and the goods had been destroyed by *floods*, the delay was the *remote* and not the *proximate* cause of the injury.

These three cases are in direct conflict with the decisions in Missouri and in New York. See *Pruitt v. Han. & St. Joe R. R. Co.*, 62 Mo. 527; *Wolf v. Am. Ex. Co.*, 43 Mo., 421; *Reed v. St. L., K. C. & N. R. R. Co.*, 60 Mo. 199; *Michaels v. N. Y. Cent. R. R. Co.*, 30 N. Y. 564; *Read v. Spaulding*, 30 N. Y. 630; and *Bostwick v. B. & O. R. R. Co.*, 45 N. Y. 712.

As to the Missouri law, the following passage from the opinion of the Court, in *Pruitt v. Han. & St. Jo. R. R. Co.* (62 Mo. page 542), will suffice: "It may be well, however, to observe that the latest decisions of this Court (*Wolf v. Am. Exp. Co.*, 43 Mo. 421, and *Reed v. St. L., K. C. & N. R. R. Co.* 60 Mo. 199), evidently incline to the position adopted by the courts of New York, and adhered to by the courts of that State in repeated cases, notwithstanding the decisions in Pennsylvania and Massachusetts, in *Morrison v. Davis* (20 Pa. 171), and *Denny v. N. Y. Cent. R. R. Co.* (13 Gray 481), and the subsequent decision of *R. R. Co. v. Reeves*, made by the Supreme Court of the United States in 10 Wall. 176. The Commission of Appeals in New York, in 1873, in view of all decisions to the contrary, including those I have just referred to, upon a re-examination of the whole subject, adhere to their former opinions in *Michaels v. N. Y. Cent. R. R. Co.* (30 N. Y. 564), and *Read v. Spaulding* (30 N. Y. 630), and *Bostwick v. B. & O. R. R. Co.* (45 N. Y. 712). In all these cases in New York it is held, that where the negligence concurs in and contributes to the injury, the defendant is not exempt from liability on the ground that the immediate damage is occasioned by the act of God or inevitable accident."

It is submitted that in the cases of *Railroad v. Reeves*, *Morrison v. Davis* and *Denny v. N. Y. Cent. R. R. Co.*, the real question seems not to have been decided. The unreasonable detention being proved in the two latter cases, the liability ensued, but the measure of that liability was another question.

Aside from this, however, the law having imposed cer-

tain duties and responsibilities upon the carrier, subject to certain exceptions, the point to be decided seems not to be strictly one of remote or proximate cause, but rather whether he is in a position to invoke the exception. And it is submitted that the policy of the law governing common carriers is such as to exclude him from pleading the exception in his favor when he is in fault. Not only must the act of God, or the public enemy have exclusively caused the damage, but the carrier must have been absolutely free from any negligence through which the goods became exposed.

In *Read v. Spaulding* this branch of the case is fully considered, and *Morrison v. Davis*, and *Denny v. N. Y. Cent. R. R. Co.* carefully reviewed. The following extracts from the opinion in that case would seem to leave nothing more to be said on this branch of the case:

"It is conceded that there was unreasonable delay on the part of the defendant in the carriage of the goods from the city of New York to the city of Albany. The 84 cases were delivered together on the 27th of January, and it was the duty of the defendant to transport or forward the same without unnecessary delay. If they had all been forwarded together the whole would have reached Louisville about the time those 5 cases reached Albany. Then it is also conceded that the goods were injured by an act of God, which ordinarily would excuse the carrier. (Page 639.)

"It is to be observed that the foundation of this exemption (that arising from the act of God) is, that the party claiming the benefit and application of it must be without fault on his part. If these goods, therefore, had been forwarded from New York to Albany with reasonable diligence, and the injury had happened to them, as it did, by an act of God, then the defendant would have been excused and exempted from liability for the damages to the goods so entrusted to him. (Page 640.)

"The carrier cannot avail himself of the exception to his

liability which the law has created, *unless he has been free from negligence himself or fault*. The policy of the law is to hold carriers to a strict liability; and this policy for wise and just purposes ought not to be departed from. But when the injury occurs from a cause which the carrier could not guard against nor protect himself from, in such an event the law excuses him, but it only does it *when he himself is not in fault and is free from all negligence*.

"There are two cases which seem to maintain a contrary doctrine, and which will now be adverted to. One is that of *Morrison v. Davis* (20 Pa. 171). In that case goods were carried in a canal boat on the Pennsylvania canal, and were injured by the wrecking of the boat caused by an extraordinary flood, and it was held that the carriers were not rendered liable merely by the fact, that when the boat was *started* on its voyage one of the horses attached was lame, and that in consequence thereof such delay occurred as prevented the boat from passing the place where the accident happened, beyond which place it would have been safe, and the general proposition was decided that carriers are answerable for the ordinary and proximate consequences of their negligence, and not for those which are remote and extraordinary. The court, in its opinion, assumed that the immediate cause had the character of an inevitable accident, but that this cause could not have affected the boat had it not been for the remote fault of *starting* with a lame horse, and the general rule was declared to be that a man is answerable for the consequences of a fault only so far as the same are the natural and proximate, and as may on this account be foreseen by ordinary forecast, and not for those which arise from a conjunction of the fault with other circumstances that are of an extraordinary nature; and it was held that the true measure of liability was indicated by the maxim, *causa proxima, non remota spectatur*.

"The other case is that of *Denny v. N. Y. Cent. R. R. Co.* (13 Gray, 481), where it was held that the proprietors of a railroad, who negligently delayed the transportation of goods

delivered to them as common carriers, and then to transport them safely to their destination, are not responsible for injuries to the goods by a flood while in their depot at that place, although the goods would not have been exposed to such injury but for the delay. The jury found specially that the defendants were wanting in that degree of care and diligence which the law required of them in seasonably transporting the plaintiff's wool from Suspension Bridge to Albany, and that the wool was injured by the want of such care and diligence. * * * * The Court held the jury only to affirm that the defendants failed to exercise due care and diligence in the prompt and seasonable transportation of the wool, and that by reason of this failure, and the consequent detention of the wool at *Syracuse*, it was injured by the rise of water in the Hudson, and thereby sustained damages to which it would not have been exposed if it had arrived at Albany as soon as it should have done, because in that event it would have been taken away from the defendant's freight depot and carried forward to Boston before the occurrence of the flood. The decision was put in the case upon the ground that the defendants were responsible only for the proximate and not for the remote consequences of their action. And the Court, arriving at the conclusion that the defendants were not liable, placed much stress upon the fact that the duty of the defendant, as carriers, had terminated at the time the injury happened. They had made the delivery required of them, and they were sought to be charged because they had not made it earlier. At the time of the flood, therefore, they were not in charge of the wool as common carriers. All their duties and responsibilities had ceased, except that they were liable for such damages as the owners had sustained by reason of their delay in the delivery of it. The court say that the rise of the waters of the Hudson, which did the mischief to the wool, occurred at a period subsequent to this, that is, the termination of their duty as carriers, and consequently was the direct and proximate cause to which the mischief is to be attributed. The

negligence of defendants was remote; it had ceased to operate as an active, efficient and prevailing cause as soon as the wool had been carried on beyond Syracuse, and could not, therefore, subject them to responsibility for an injury to plaintiff's property resulting from a subsequent inevitable accident which was the proximate cause by which it was produced.

"In the case at bar, the property was yet in the custody, care and control of the carrier. His duty in relation to it had been only in part performed, and although the injury would not, doubtless, have happened but for the negligence of the defendant, yet it can hardly be said that such negligence was so remote that it did not contribute to the injury. A similar objection was urged in *Davis v. Garrett* (6 Bing. 71st), where it was urged that there was no natural or necessary connection between the wrong of the master in taking the barge out of its proper course and the loss itself, for that the same loss might have been occasioned by the very same tempest if the barge had proceeded in her direct course. But the court held the objection untenable, and said the same answer might be attempted to an action against a defendant who had by mistake forwarded a parcel by the wrong conveyance and a loss had thereby ensued, and yet the defendant in that case would undoubtedly be liable.

"These cases in Pennsylvania and Massachusetts would seem to establish the exemption of the defendant from liability in the present case. If they are to be regarded as holding that doctrine they are certainly in conflict with numerous adjudged cases, and would greatly relax the rules as to the responsibility of common carriers; and in this State, where, with one exception, these rules have been rigidly adhered to, they ought not to be followed. When the carrier is entrusted with goods, and they are injured or lost on the transit, the law holds him responsible for the injury. He is only exempted by showing that the injury was caused by an act of God or by the public enemy. *And to avail himself of such exemption, he must show that he was free from fault at*

the time. In the language of the Superior Court, "a common carrier, in order to claim exemption from liability for damage done to goods in his hands in course of transportation, though injured by what is deemed the act of God, must be without fault himself; his act or neglect must not concur and contribute to the injury. If he departs from the line of duty and violates his contract, and while thus in fault, and in consequence of the fault, the goods are injured by the act of God, which would otherwise not have caused the injury, he is not protected." (Pages 642-646.)

See also,

Michaels v. N. Y. Cent. R. R. Co., 30 N. Y. 564.

Cook v. Gourdin, 2 Nott. & M. 19.

Williams v. Grant, 1 Conn. 487.

Crosby v. Fitch, 12 Conn. 410.

Campbell v. Muse, 1 Harp. 468.

Morgan v. Dibble, 29 Tex. 107.

Bell v. Reid, 4 Binney, 127.

Hart v. Allen, 2 Watts, 114.

Hand v. Baynes, 4 Whar. 204.

Buson v. Charleston Steamboat Co., 1 Harp. 262.

Condict v. Railway, 54 N. Y. 500.

Dunson v. Railroad, 3 Lans. 265.

Mich. Cent. R. R. v. Curtis, 80 Ill. 324.

Southern Exp. Co. v. Womack, 1 Heisk. 256.

But there are two broad grounds of distinction between R. R. Co. v. Reeves, 10 Wall. 176, and the Pennsylvania and Massachusetts cases mentioned, on the one hand, and the case at bar on the other.

1. The exception in all those cases was one allowed by law, independently of contract. They were all cases of damage by *flood*. In the case at bar, the injury was from fire, which the law takes no cognizance of as an excuse, except under a contract. But the defendant is shown to have broken by negligent delay the very contract on which it relies for immunity.

2. At the time the loss occurred the defendant was actually detaining the goods on the Long Dock in violation of the supposed special contract, and of its duty to the shipper as prescribed by law.

It is to be remembered that the White Star Line knew the cotton was at the Erie Dock, wanted it, and demanded it both of the agents of the Erie Railway and of the Despatch Co., thereby waiving the usual routine of obtaining a permit from their own office. But both the Erie Railway and the Despatch refused to make delivery. (Record, pages 25, 27, 28.)

For the purposes of this suit, both the Erie Railway and the Despatch were agents of, or joint contractors with, the defendant, and their neglect and refusal were the neglect and refusal of the defendant.

If a loss occurs by an excepted peril whilst the carrier is in the commission of a wrong or the omission of a duty, it is no defense for him to show that the loss might have happened if he had not been in fault; he must show that it was wholly independent of his misconduct, and *must* have happened.

Davis v. Garrett, 6 Bing. 716; 19 Eng. C. L. 215.

Collier v. Valentine, 11 Mo. 299.

Hill v. Sturgeon, 28 Mo. 323.

Read v. St. L., K. C. & N. R. R. Co. 60 Mo. 199.

Vail v. Pacific R. R. Co., 63 Mo. 230.

Pruitt v. Han. & St. Joe R. R. Co., 62 Mo. 527.

Michaels v. N. Y. Cent. R. R. Co., 30 N. Y. 564.

Read v. Spaulding, 30 N. Y. 630.

3 Kent Com., 210.

Story on Bailments, Sec. 413d.

2 Pars. Cont. (5th Ed.). 160-1.

In Davis v. Garrett, 6 Bing. 716, a cargo of lime had been shipped from Medway to London. The vessel deviated, and whilst out of her proper course was overtaken by a storm. The lime was wet and heated, and the vessel and cargo lost.

In delivering the opinion of the court, Tindal, C. J., says: "No wrong-doer can be allowed to apportion or qualify his own wrong; and as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he can not set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss *might* have happened, but that it *must* have happened, if the act complained of had not been done."

Broom's Leg. Max. 208.

However the case might stand in the light of *Railroad v. Reeves*, *Morrison & Davis*, and *Denny v. N. Y. Cent. R. R. Co.*, if the misconduct of the carrier was confined to the delay in sending the goods through to Jersey City, it is taken entirely out of the principle of those cases by the fact that the goods were being wrongfully detained and held on Long Dock by the carriers *at the time the loss occurred*. "All the cotton embraced in said two lots was carried over the connected line of railroads, in the amended petition mentioned, to the Erie Railway Long Dock." (Record, page 26.) "On the arrival of the cotton at Jersey City, it was unloaded upon the dock of the Erie Railway, and left to lie there from two to 19 days. It was not removed to, or stored in, any *public* warehouse, but it was left exposed on the *private* dock of the Erie Railway, in a depot built of wood and with a wooden roof. The White Star steamers were sailing for Liverpool every Saturday, and its agents knew of the cotton being on the Erie dock, and that it was to go by their line, needed it to fill their vessels, *and made repeated demands for it, both of the agents of the Erie & Pacific Despatch and of the agents of the Erie Railway, and were refused by both.*" (Record, page 25). "The Erie Railway were able to deliver the Meier cotton as it arrived." (Record, page 28.)

These facts show that the carriers of the connected line were actually violating their duty, and wrongfully detaining the goods at the time the loss occurred. No such fact appeared in either of the three cases decided by this Court, and by the Supreme Courts of Pennsylvania and Massachusetts.

In *Railroad v. Reeves*, the "train found the road obstructed by rocks that had fallen during the night, and had to return, and in consequence of information of the washing away of a bridge on the road, *had to remain in Chattanooga.*" It was there caught by the flood and the goods injured.

In *Morrison v. Davis*, the ground of complaint was, that the carrier "*started with a lame horse.*"

In *Denny v. N. Y. Cent. R. R. Co.* the negligent detention was at *Syracuse*; the injury from the flood, after the goods had arrived at *Albany* and the carrier had ceased to be a common carrier of them.

These cases therefore are not authority against the proposition, that if a loss occurs by an excepted peril *whilst* the carrier is in the commission of a wrong, or in the omission of a duty, he cannot claim the benefits of the exception.

It is established that a deviation will subject the carrier to liability, notwithstanding the loss occur by an excepted peril. But unreasonable delay is tantamount to deviation.

"An unreasonable and unnecessary delay in commencing a voyage, where the risk begins with the sailing of the vessel from the port, or a similar delay in port, where the insurance is "at and from a port," and the risk has commenced, or an unusual, extraordinary and unnecessary extension or protraction of a voyage, either at sea or in a foreign port, is a deviation, because it is certainly a change, and indeed an increase of the risk. And if goods are insured until safely landed, an unusual and unnecessary delay

in discharging them will exonerate the insurers. * * * *
But this question is, as in all cases of deviation, has there been any *voluntary* extraordinary delay, not justified by necessity, or anything equivalent to necessity?"

2 Pars. on Mar. Law, page 281-3.

2 Pars. Cont. 161.

"Unreasonable delay by the carrier has been held to be the same in its effect upon the insurance upon the cargo as a deviation. In *Mount v. Larkins* (1 Bing. 108), it was so held by Tindal, C. J.: * * * * "If equivalent to a deviation as to the insurer, it is not perceived why it should not be so as to the carrier itself; and if it be so, he should undoubtedly be held liable for any loss which can be traced to it, although the immediate cause of such loss may be an inevitable occurrence which comes within the meaning of the act of God; for nothing is better settled than that in case of deviation the carrier will be liable, no matter what the immediate cause of the loss may have been, because the law will trace the loss back to the first fault, and will there fix the liability for it even though the immediate cause may have been some violent and unavoidable change or convulsion in nature. In other words, whenever the carrier attempts to evade responsibility for the loss by charging it to such a cause, he can be successfully met by showing the deviation."

Hutchison on Carriers, Sec. 199.

Story on Bailments, Sec. 509.

Davis v. Garrett, 6 Bing. 716.

Crosby v. Fitch, 12 Conn. 410.

Lawson on Cont. of Carriers, pages 181-186, and cases cited.

The unwarranted detention at Long Dock, whatever may be said of the previous delay, brings the case clearly within the principle of deviation. The detention if not

"*causa causans*, was *causa sine qua non*, the *efficient cause* of the loss."

Furthermore, the White Star Line demanded the cotton of the Erie Railway and of the Despatch, and both refused to deliver. The carriers thereupon became insurers at all events. They stood in the position of tortfeasors. Their refusal was equivalent to a conversion.

"If the depositary improperly refuses to re-deliver the deposit, when it is demanded, he henceforth holds it at his own peril. If, therefore, it is afterwards lost, either by his neglect, or by accident, it is his own loss; for he is answerable for all defaults and risks in such cases."

Story on Bail., Sec. 122.

This rule is equally applicable to other bailees. As the cotton was to go by the White Star Line, and this fact was known to the E. & P. Despatch and the Erie Railway, the steamer line was sufficiently authorized to make the demand as consignees' agent.

It follows that, no matter whether the bills of lading be held to embrace the contracts of shipment or not, the defendant cannot claim the benefit of the clause exempting the carriers from loss by fire.

It is objected, however, that by a clause in the bills of lading (Paragraph 3, of Conditions), it was provided that in case of loss during such transportation, that company alone should be held answerable therefor in whose actual custody the goods should be at the time; and that defendant having carried safely to Indianapolis is not liable.

This is to give a construction to the bills of lading that they can by no means bear. The words, "that company," can only refer to the Erie & Pacific Despatch or the Oceanic Steam Navigation Co.

The bills of lading on their face are those of the Despatch and the Steamship Co. only. The offices and agents of these two companies, and of these only, are set out in the margin.

In paragraphs one and two, "the Despatch and its connections" are referred to. *Connections* must mean carriers beyond the point to which the Despatch contracts. In paragraph one, it is provided that the property is to be transported to the depots of the companies, or landings of steamboats, or forwarding lines at the points receipted to for delivery. This plainly means depots of companies, etc. in Liverpool, "the point receipted to for delivery."

The phrase "during such transportation" is intended to cover the whole carriage from St. Louis to Liverpool, mentioned in the caption, and implied in the receipt at St. Louis for delivery at Liverpool.

The words "that company" can only naturally apply to one of the two companies which are parties to the contract on the face thereof, and were intended to limit the Despatch to inland risks and the Steamship Co. to ocean risks. This is the only signification they could bear to the mind of a person receiving the bills, and who "had no knowledge of the arrangements between the railroads, and between the Despatch and the railroads, and only knew that the cotton was to go to New York, and thence by the White Star Line to Liverpool." (Record, page 20.)

It subsequently appears that there are concealed under the name of the Despatch four railroad companies, by whose authority, and for whom, though in its own name, it made, in connection with the steamer line, a through contract. It is claimed that each of these principals is entitled to the benefit of the exemption which the Despatch reserved to itself, and to further enlarge it so as to apply it severally to the railroad line of each of its principals. The Despatch reserved one exemption for itself from liability *after* the goods reached White Star wharf, and one for the Steamer Co. *until* the goods reached that wharf. This latter exemption the defendant would not only enlarge to cover the four, or even six, companies that are concerned in the inland transportation, but would split up into four or six several contracts of exemption covering their separate lines of carriage.

This is to give a latitude to the contract that never could have been dreamed of by the parties.

True, when resort is had to the principals, the latter have a right to any defense which the agent could set up. The Despatch would not be liable after the goods passed into the actual custody of the White Star Line; neither would the defendant. This construction accords with the fact that the bills are signed by the Despatch agent for the two companies severally, but not jointly, and with the provision of paragraph 5, which declares that the liability of the Despatch as common carriers terminates on the delivery of the property at White Star wharf, when the liability of the Steamship Company begins, and not before." The other construction would negative the provisions of paragraph 5 and exempt the Despatch from all liability whatever, for it never had the "actual custody" of the goods; it only had actual custody of the cotton notes.

If the subdivision of liability contended for by defendant had been intended and honestly expressed by the agents who prepared and signed the bills, there would have been a recital that the goods were to be carried by sundry companies other than those named, and then a provision that such companies should not be liable except for losses occurring whilst they had actual custody of the goods. Surely the maxim, *fortius contra proferentem*, applies to just such cases as this; otherwise "men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them." 2 Bla. Com. 380; Broom's Leg. Max. 529, 532. If the Despatch was defendant's agent, defendant's liability was co-extensive with that of the agent; the defense that defendant safely carried the goods to its own terminus, can only avail if the relations of the parties are reversed, and defendant was the employee of the Despatch; and also if the shipments were made under the bills of lading, and not under oral contracts.

The defendant is, therefore, liable whether the bills of lading embrace the contracts of shipment or not.

V.

THE GOODS WERE IN TRANSIT AT THE TIME OF THE LOSS.

The transit terminated only on delivery at the White Star Dock.

This was the point to which the Erie & Pacific Despatch had authority to contract on behalf of defendant, and was the point to which the rate of 90 cents per 100 lbs. named in defendant's general tariff and way-bills paid for the transportation. This is the point to which the defendant's connecting road in New York by the line in question, the Erie Railway, was in the habit of delivering the freight. This is the point where the cotton not destroyed was delivered by the Erie Railway and accepted by the White Star Line. It was for the ocean rate from the White Star Dock, where alone that line received goods, that the Erie & Pacific Despatch agent telegraphed before giving Mr. Meier a through rate to Liverpool.

Even the bills of lading show that the liability of the Despatch and the other carriers concealed under that name, "terminates on the delivery of the goods or property to the Steamship at White Star Wharf, Jersey City, when the liability of the Steamship Company commences and not before."

The cotton which was not destroyed was carried to this dock, which was distant 723 feet from Erie Railway Long Dock, and for this defendant and the other members of the line received pay under the contracts.

The cotton was therefore destroyed while in transit, and the carriers not being entitled to claim exoneration under the bills of lading, for the reasons above shown, defendant's liability was that of an insurer.

Even if the Erie Railway Depot had been the terminus of the transit, the duty of defendant as carrier would not have

been discharged until a delivery or offer to deliver to the next carrier.

Railroad Co. v. Manuf. Co., 16 Wall. 318.

It is urged, however, that the Erie Railway gave notice to the Despatch, and that the latter neglected to have the cotton removed as the notice required.

This only establishes defendant's liability. The Despatch being agent of both the Erie railway and defendant, its neglect was theirs. The Erie Railway was also, for the purposes of these shipments, defendant's agent, and it not only neglected to make delivery to the Steamer Line when requested, but failed to conform to the terms of its own notice. It did not store the cotton in a "*public store or warehouse*," but left it exposed to its own "*private dock*."

VI.

JUDGMENT SHOULD HAVE BEEN RENDERED FOR THE PLAINTIFF INSTEAD OF FOR THE DEFENDANT.

"After the loss occurred, the said Adolphus Meier & Co., and C. G. Meier & Co., for valuable consideration, assigned to plaintiff all their damages and right of action therefor against defendant, and each and all of the other carriers responsible therefor, the plaintiff being the insurer for Meier & Co." (Record, page 26.)

If the above points are well taken, it has been shown that, in view of the law and the facts, the Erie & Pacific Despatch was agent for defendant and the other members of the connected line mentioned, and as such made the contracts of shipments in question; that these contracts were oral and without any limitation of the carriers' common law liability, or if expressed by the bills of lading, the defendant, by reason of breach thereof by unreasonable delay in the transportation,

and wrongful and willful detention at Long Dock after demand for delivery by the White Star Line, cannot claim the benefit of the clause giving exemption from loss by fire; that the goods were destroyed by fire before the termination of the transit under defendant's contracts; and that defendant is liable therefor as an insurer. These things being so, it follows that plaintiff should have had judgment in the court below for the value of the cotton as found by the court, with interest.

Inasmuch as the cotton was not only delayed in transportation, but wilfully detained at Long Dock in violation of defendant's duty, it is but just that interest should be allowed from the time the court found the cotton ought to have been delivered at the White Star Dock.

The measure of damages is the value of the goods at the time and place of destination, to which the jury may add interest to the time of trial.

Gray v. Mo. River Packet Co., 64 Mo. 47, 50.

Smith v. Whitman, 13 Mo. 352.

Sparr v. Wellman, 11 Mo. 230.

Moody v. Caulk, 14 Fla. 50.

Kyle v. Laurens R'y, 10 Rich. (S. C.) 382.

In the case of Gray v. Mo. River Packet Co., 64 Mo. 47, Napton, J., delivering the opinion of the court (p. 50) and referring to an instruction given for the plaintiff, that if the jury found for the plaintiff they should assess his damages at the actual value of the property at the time it was shipped, with six per cent. interest from that time, said: "It is a general rule that when goods are not delivered by a common carrier according to contract, the measure of damages is the value of the goods with interest from the day they should have been delivered, less the freight, if unpaid. (Sedg. on Dam. 424; King v. Shepherd, 3 Story, 349; Cushing v. Wells, Fargo & Co., 98 Mass. 550; Woodward v. Ill. Cent. R. R. Co., 1 Bissel, 503; Corby v. Davidson, 13 Minn. 92; Mote v. Chicago & N. W. R. R. Co., 27 Iowa, 22.)

In the case of *Atkinson v. Steamboat Castle Garden* (28 Mo. 124), Judge Scott remarks, "That the allowance of interest in these cases depends on circumstances, and will be given or withheld, as in all other cases of unliquidated damages. When a loss occurs without negligence in cases of this class, interest might be withheld. In the case at bar the negligence was of the grossest character. We think the circumstances justified the allowance of interest."

Story on Bailments, Sec. 123.

Certainly the plaintiff in this case is warranted in claiming interest for negligence in transportation of the goods to Jersey City, and for the wilful and wrongful detention of them there till their destruction.

The amount of V. I. C. cotton destroyed was	
67,031 lbs., amounting, at 19½ cts., to.....	\$13,322.41
Deduct freight at 90 cts. per 100 lbs.....	603.27
	<hr/>
	\$12,719.13

Add interest from Feb. 15, 1873, to date of judgment, at 6 per cent., the rate in Missouri.

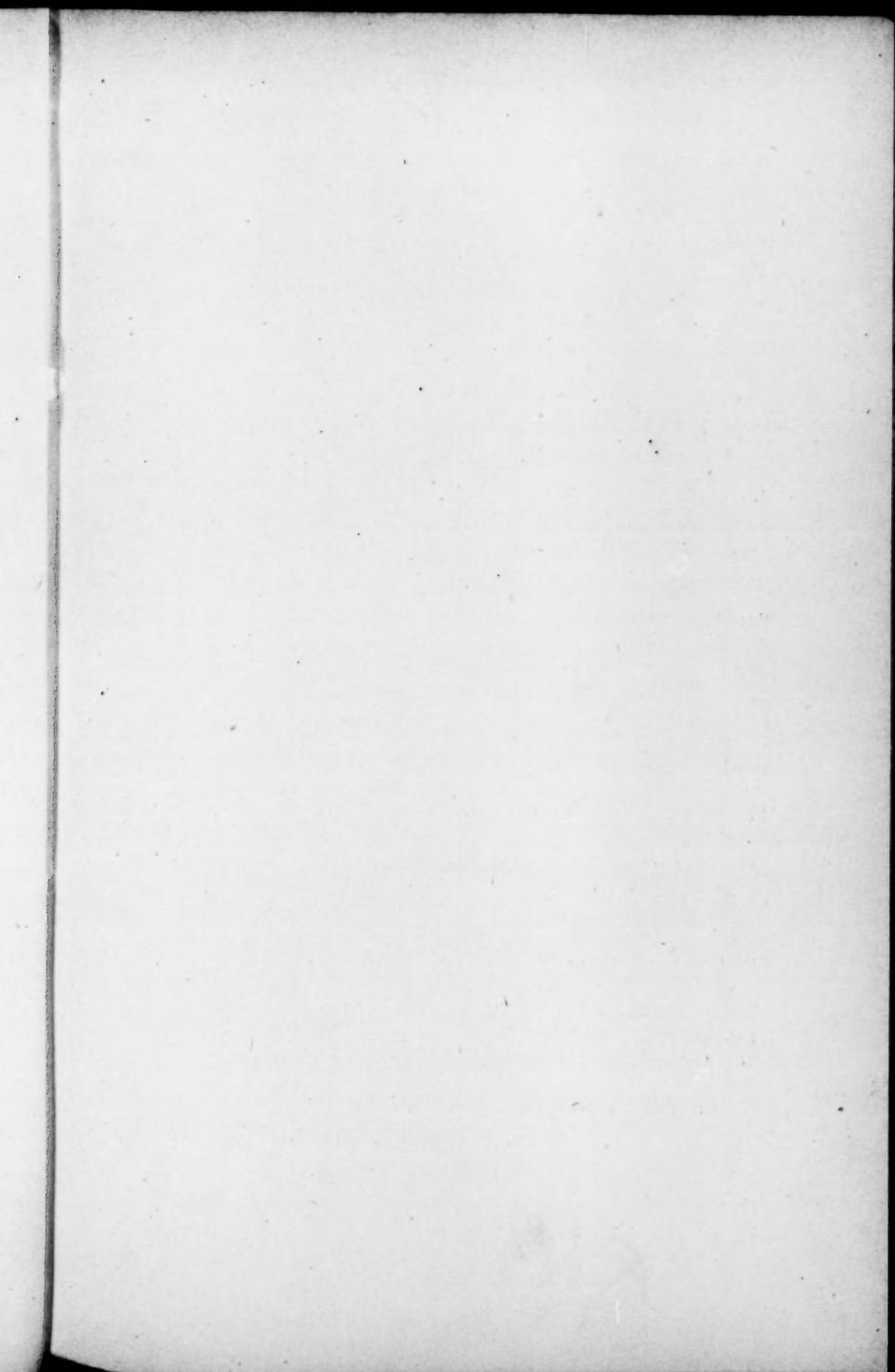
The amount of P. I. G. cotton destroyed was	
284,839 lbs., amounting, at 19 cts., to.....	\$54,119.57
Deduct freight at 90 cts. per 100 lbs.....	2,563.35
	<hr/>
	\$51,556.02

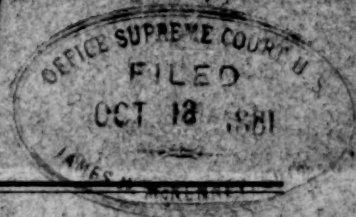
Add interest from March 13, 1873, to date of judgment, at 6 per cent.

Therefore, plaintiff prays judgment of reversal, and entry of judgment in its favor in this court for the value of the cotton assessed by the court as aforesaid, and interest.

All which is respectfully submitted,

JOHN G. CHANDLER,
Counsel for Plaintiff in Error.





Supreme Court of the United States.

OCTOBER TERM, 1881.

ST. LOUIS INSURANCE CO.,

Plaintiff in Error.

vs.

ST. LOUIS, VANDALIA, TERRE HAUTE &
INDIANAPOLIS R.R. CO.,

Defendant in Error.

No. 47.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR.

JOHN G. CHANDLER,

Counsel for Plaintiff in Error.

Supreme Court of the United States.

October Term, 1881.

ST. LOUIS INSURANCE CO.,

PLAINTIFF IN ERROR,

vs.

ST. LOUIS, VANDALIA, TERRE HAUTE &
INDIANAPOLIS R.R. CO.,

DEFENDANT IN ERROR,

No. 47.

Argument of Plaintiff in Error in Reply.

I.

"The Plaintiff sues upon an express agreement to carry from St. Louis to White Star Dock."—*Def't's Brief*, page 18.

Technically, this is not so. The action is in tort for breach of duty. The allegation of an agreement is matter of inducement.

The averment is in substance that the shippers delivered the goods to the connected line to be carried for reasonable hire to the White Star dock; that they accepted them to be carried to that point, and failed in their duty.

The proof corresponds with the averment.

1. The defendant's way-bills show that was the extent of the undertaking by the railroad line.

2. Hibbard gave to the Despatch the rate for the inland transit alone. The steamer line gave the ocean rate.

3. All the goods not lost were actually carried to the White Star dock, and those lost were bound for that point.

4. The agent for the Despatch had no authority to contract on behalf of the steamer line for inland carriage, or on behalf of the railroad line for ocean carriage. His agreement, therefore, though in form to carry through to Liverpool, was in substance two agreements—one for each of his respective principals—for the one to carry to the White Star wharf, and for the other to carry thence to Liverpool.

Suppose the averments of the petition had been enlarged so as to state that the Despatch was agent for both sets of carriers, and in its own name made a contract to carry from St. Louis to Liverpool, but in that behalf it acted only as agent for the railroad line and the steamer line, having no authority in one case to contract for ocean transportation, or in the other for inland carriage, and that the goods were to go by the railroad line to the White Star wharf, and thence by the steamer line to Liverpool, there could be no question of variance, and yet the legal fact averred would be precisely the same as we now have. Some evidence would have been introduced into the pleading. The chief difference would have been one of prolixity.

II.

"Each contract simply provided for hauling Erie & Pacific Despatch freight over the line of the road making the contract."—*Def't's Brief*, page 18.

This is not so.

1st. The finding contains no such statement.

2d. The Erie R'y contract (Record, page 15) in the first article provides that the road "agreed to transport all *through* freight secured by the Despatch, either eastward or westward bound, passing *between Philadelphia, New York, Jersey City, Albany, Boston*, and common or competing points in *New England*, and common or competing points on the line of said Erie Railway, except that on east-bound freight they (Despatch) *shall receive no commission* on shipments from any station *on the line of the railway of the party of the first part*."

This shows that the only kind of contracts which the Despatch was desired or paid to make were contracts for *through freight*.

3d. Article 2d provides that the agreements of the Despatch shall be "subject as to rates to the current *through rates*" of the railway.

4th. Article 3d requires the Despatch to establish and maintain "agencies for soliciting and procuring freight in the cities of *New York and Boston*, and other cities in the *East or West*."

Why so, except that by article 1st the railway was to transport all *through freight* secured by the Despatch?

5th. The commissions to be paid under article 8th were on freights between numerous points East and West, many of them not on the Erie railway, as to east-bound freight, it being distinctly provided that no commission should be

paid unless the freight originated *off* the line of the Erie Railway.

6th. The defendant's agreement was, in substance, the same as that of the Erie Railway. (Record, page 16.)

7. "There were arrangements effected between the Erie & Pacific Despatch and sundry railroads having connections terminating in New York, under which the Despatch was empowered to contract for the transportation of goods according to the tariff rates, or any special rates furnished by the railroads, the roads agreeing to carry the goods so contracted for *to their proper destination.*" * * * "The Despatch had such agreements with the four railroads named in the amended petition, *including the defendant*, and a large amount of business was done *over this line and defendant's road thereunder.*" (Record, page 14.)

8th. "On through shipments from St. Louis to Liverpool the Despatch contracted for a *through* rate in this way: They applied to H. W. Hibbard, defendant's general freight agent, for the inland rate—that is, the all-rail rate—including lighterage and transfer charges as aforesaid, or they took it from the published tariff, though the agents of the fast-freight lines, of which the Despatch was one, were in the habit of applying to Mr. Hibbard for special rates. *The inland rate* furnished by defendant was added *to the ocean rate* given by the White Star Line, and this sum constituted *the through rate* to Liverpool at which the Despatch contracted with the shipper." (Record, page 17.)

"When, on or about the said 20th day of January, in the case of the V. I. C. lot, and about the 18th day of February, in the case of the P. I. G. lot, Theodore Meier, of the firm of Adolphus, Meier & Co., acting for said two firms, applied to the agent of the Erie & Pacific Despatch at St. Louis for a through rate to Liverpool, the agent telegraphed to the White Star Line at New York for *the ocean rate*, added that

to the inland rate, and gave Mr. Meier the through rate." (Record, page 19.)

These facts show that the Despatch acted separately and independently for the steamer line and for the railroad line. Had it acted separately for each railroad of the line, it would have applied to each one for its rate and added them together for the inland rate.

The above considerations also effectually dispose of the point that if the Despatch was agent, it was agent for each road separately. (Def'd't's Brief, page 16.)

What is the odds whether the four roads jointly, or each of them separately, authorized the agent to make *through* contracts, which by the understanding between the roads they were bound to carry out by transporting the goods "to their proper destination?"

III.

"The naming of a through rate does not imply a through contract."—*Def'd't's Brief*, page 20.

In support of this proposition, Edwards on Bailments (sec. 581) is cited. Edwards says: "An agreement fixing the freight at one sum over the entire line does not *make* it a through contract." He does not deny that a through rate *implies* a through contract—an implication that may be controlled by other facts. No one of the authorities cited by Edwards supports the idea that "the naming of a through rate does not imply a through contract."

The citations are—

Ætna Ins. Co. vs. Wheeler, 49 N. Y., 616.

Lamb vs. C. & A. R.R. Co., 46 N. Y., 271.

C. H. & D. R.R. Co. *vs.* Pontius, 19 Ohio St., 221.

Schneider *vs.* Evans, 25 Wis., 241.

Lans., 446; S. C., 59 N. Y., 637.

Ætna Ins. Co. vs. Wheeler was upon a contract to carry to the end of the first carrier's line only, with a mere memorandum of the through freight in the margin.

Lamb vs. C. A. R.R. Co. was upon a contract of the Illinois Central R.R. Co. to carry to Chicago only, and there forward. The loss was on the Camden and Amboy road in New Jersey, and the suit against the latter road. In this case the court say: "Nor does fixing the value of through freight *necessarily* have the effect of making it a through contract." (46 N. Y., page 282.) The plaintiff ultimately recovered. (4 Daly, 283.)

Railroad vs. Pontius was upon a contract expressly limiting the railroad's undertaking and its responsibility to its own line.

Schneider vs. Evans was replevin against the last carrier. The goods were not lost. The carrier was held entitled to retain the goods for his freight according to his own tariff, notwithstanding the first carrier had guaranteed that the through rate should not exceed a specified amount. The plaintiff was turned over to his remedy against the first carrier on the guaranty. It was a stipulated fact that each of the companies acted independently, and that *they did not form a continuous line interested together in the transportation over the whole route.*

The decision in this case is sharply and justly criticized by Judge Redfield. (2 Redf. Ry. Cas., 217-317.)

The case in 4 Lans. and 59 N. Y. turned solely on a condition in the bill of lading limiting the liability to the carriers having actual custody. The court say: "A bill of lading was delivered to the carman who brought the goods,

which contained a provision, in substance, that no connecting carrier should be held liable for any loss or damage to goods except what occurred on his own road."

The other cases cited in defendant's brief, page 20, likewise fail to sustain the proposition.

In *Railroad vs. Forsythe*, (61 Pa. St., 81,) the suit was not against the first carrier, but against the one having actual custody of the goods. The latter set up as a defence an exception in the first carrier's bill of lading, but this was held inapplicable, and the defendant liable. The case has no bearing whatever on the point to which it is cited.

In *Gray vs. Jackson*, (51 N. H., 9,) the defendants were expressmen running from Portsmouth to Boston. They received at Portsmouth, besides packages for Boston, packages for all parts of the country, and at the end of their route delivered them to other expressmen to be forwarded. *There was no evidence that the defendants had any business connection or arrangements with other expressmen.* The court say, however, (page 11:) "A contract to carry the parcel to Reading must be a mutual understanding of the parties. It may be proved expressly or by *implication*, by direct or *circumstantial* evidence, by writing or parol, by words, *conduct*, or *usage*. The understanding may be mutual, in contemplation of law, if defendants are estopped to deny that it is mutual."

The case is in entire harmony with *Lock Co. vs. R.R. Co.*, (48 N. H., 339,) in which it is distinctly held that a *through rate* implies a *through contract*. *Snider vs. Adams Exp. Co.* (63 Mo., 367) was upon a bill of lading constituting the defendant a mere forwarder beyond its own line.

The Connecticut and Massachusetts cases cited would seem to lend some color of authority to the proposition. They are not, however, in accord with the current of decision in this country, and are flatly opposed to the views of this court in

Railroad *vs.* Pratt, (22 Wall., 123.) In both States it is decided that a contract to carry beyond its own line cannot be implied in any case; and in Connecticut it is held that such a contract is *ultra vires*.

The supreme court of New Hampshire, in Lock Co. *vs.* R.R. Co., says of these decisions, that they are not in harmony with the general current of decision.

Judge Redfield, referring to Darling *vs.* Railway, (11 Allen, 295,) and Gass *vs.* Railroad, (99 Mass., 220,) says: "These cases seem to exclude the idea of an implied contract, resulting from the circumstances under which the goods are received and billed and the price of transportation paid in advance to the ultimate destination, to carry them to that point, while in most of the American States that view is admitted as being consistent with the rule that no such contract results from the mere acceptance of the goods for transportation to a point beyond the line of the first carrier, as in the English rule.

The English view seems to go upon the extreme view of always holding the first carrier responsible throughout the transit; and the later Massachusetts cases take the opposite extreme of never holding the first carrier liable beyond his own line, except upon the basis of a special understanding, and both classes of cases seem to be based upon the same policy in one respect—that of fixing an inflexible rule in the case which may be always easy of application both by the courts and by business men." * * *

"But it would seem that the rule attempted to be maintained by the late Massachusetts cases is somewhat liable to the same criticism as the English rule, viz., that it becomes *unjust and unreasonable* in an extreme pursuit of convenience or facility of application. To say that no amount of connection in business, short of an actual partnership, will justify the presumption, in law or fact, that the first carrier

consented or expected, or, what is the same, gave the owner of the goods good ground to believe that he so consented or expected to be bound throughout the line, or to any point upon it beyond his own particular line, and especially to say that this and billing the goods and accepting the freight throughout the line shall not have that effect, or that all these and other circumstances shall not have that effect, seems *unjust and unreasonable*. If we were to choose in fixing a hard and fast line between the two extremes attempted to be maintained respectively by the English and Massachusetts courts, we should feel compelled to adopt that of the English courts, upon the ground suggested by Baron Rolfe in *Muschamp vs. L. & P. J. Railway*: "All convenience is one way, and there is no (certain) authority the other way."

2 Redf. Ry. Cas., 288-290.

IV.

"The ordinary and customary manner of handling and delivering these Erie & Pacific Despatch freights entered into and formed a part of the contract between Meier & Co. and the Erie & Pacific Despatch."—*Def't's Brief*, page 24.

At most this was a special custom of the E. & P. Despatch and the Erie Railway, and unknown to Meier & Co. The finding states: "At the time the rates were agreed upon and the cotton notes delivered the owners of the cotton had

no knowledge of the arrangements between the railroads and between the Despatch and the railroads, as above set forth. Mr. Meier only knew that the cotton was to go to New York, and thence by the White Star Line to Liverpool." (Record, page 20.)

In *Bliven vs. Screw Co.*, (23 How., 420, 431,) this court say: "No evidence of general custom or usage in the ordinary sense was offered. * * * A special custom of the party to deliver a part of a quantity of goods contracted to be delivered, though invariable, cannot excuse such party from a full compliance with his compact *unless such custom is known to the other contracting party and actually enters into and forms a part of the contract. Mere knowledge of such a usage would not be sufficient*, but it must appear that the custom actually constituted a part of the contract."

The case of *Angle vs. Railroad* (9 Iowa, 487) puts this limitation on the binding force of the usage. It must be *known* to the shipper.

Dixon vs. Dunham (14 Ill., 324) was a case of general custom at the port of Chicago. It declares substantially the same doctrine as *Bliven vs. Screw Co.*, (23 How., 420.)

Loveland vs. Burke (120 Mass., 139) was a case of *general* local usage.

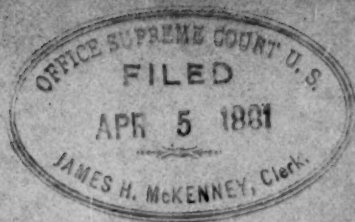
The cases of *McCarty vs. Railroad* (30 Pa. St., 247) and *Bank vs. Transportation Co.* (18 Vt., 131, and 23 Vt., 186) did not turn on the effect of usage, but upon the general principle of law, that when goods have arrived at their destination the responsibility of the common carrier, as such, ceases.

Furthermore, in the present case the usage can avail the defence nothing. The White Star Line "demanded the goods both of the agents of the Erie & Pacific Despatch and of the agents of the Erie Railway, and were refused by

both." Defendant's agent failed to perform its duty under the usage by getting the permit, and when the steamer line waived that and demanded the goods, both the agent (the Despatch) and the terminal carrier of the line refused to make delivery.

Respectfully submitted.

JOHN G. CHANDLER,
Counsel for Plaintiff in Error.



SUPREME COURT OF THE UNITED STATES.

No 288.

OCTOBER TERM, 1880.

THE ST. LOUIS INSURANCE COMPANY, *Plaintiff in Error.*

VS.

ST. LOUIS, VANDALIA, TERRE HAUTE & INDIANAPOLIS
RAILROAD COMPANY, *Defendant in Error.*

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

S

SUPREME COURT OF THE UNITED STATES.

No 288.

OCTOBER TERM, 1880.

THE ST. LOUIS INSURANCE COMPANY, *Plaintiff in Error.*

vs.

ST. LOUIS, VANDALIA, TERRE HAUTE & INDIANAPOLIS
RAILROAD COMPANY, *Defendants in Error.*

STATEMENT.

The plaintiff as assignee of A. Meier & Co. and C. G. Meier & Co. brings this action for the value of a large amount of cotton which it avers was on or about the 20th day of January, 1873, and on or about the 18th day of February, 1873, delivered at St. Louis, Mo., by Meier & Co. to a continuous and connected line of common carriers composed of the defendant in error,—the Pittsburgh, Cincinnati & St. Louis R. R. Co.—the Atlantic & Great Western R. R. Co. and the Erie R. R. Co., to be transported by said lines from St. Louis to the dock of the "White Star Line" or Oceanic Steam Navigation Company at Jersey City, and there delivered to said last named company, the same being common carriers by ocean vessels between said dock and Liverpool, England.

The petition then avers: "And said line of railway common carriers then and there accepted and received said cotton and agreed for certain reasonable hire and reward in that behalf, then and there agreed by said firms to be paid by them to carry and transfer the same to said White Star Dock and there deliver the same as aforesaid; said White Star Line at the same time agreeing to accept the same at the said dock and transport the same to Liverpool, aforesaid for certain reasonable hire agreed to be paid them therefor by said firms."

Record pages 8 and 9.

The petition then avers negligence and delay on the part of said line of carriers and the consequent non-delivery, loss and destruction of a large amount of the cotton.

The answer puts in issue every averment in the petition except that one which states the corporate capacity of the defendant and then for further defense states in substance that Meier & Co. entered into an agreement with an association known as the Erie & Pacific Despatch whereby said Erie & Pacific Despatch agreed to receive and transport the cotton mentioned in the petition from St. Louis to Liverpool upon certain conditions specified and for certain freight to be paid upon delivery of the cotton to C. G. Meier & Co., at Liverpool, England; that the Erie & Pacific Despatch received this cotton of Meier & Co. and delivered it to the defendant to be by defendant carried from East St. Louis to Indianapolis and no further and there to be delivered to the next succeeding line; that defendant did so carry and deliver the cotton without any loss or damage and that if any of the cotton was lost or destroyed the same occurred long after defendant's responsibility therefor had terminated. The reply denies every allegation of new matter contained in the answer.

The issues thus formed were tried by the Court and a special finding of the facts made which in substance is as follows:

The Erie & Pacific Despatch was a corporation organized under the laws of Kansas and engaged in the business of soliciting and forwarding freights. It owned no railroad but had arrangements with different railroads to haul freight obtained by it over their respective lines; it had also arrangements with all the different steamship lines out of New York, including the White Star Line, whereby it could issue a joint bill of lading for freights going from points distant from the seaboard to foreign ports.

Record page 28.

Among other roads with which this Despatch had arrangements were the defendant in error, the Pittsburgh, Cincinnati & St. Louis, the Atlantic & Great Western, the Erie, the Ohio & Mississippi, and the Cincinnati, Hamilton & Indianapolis, sometimes known as the "Junction Railroad."

Defendant's line extends from East St. Louis to Indianapolis; the Pittsburgh, Cincinnati & St. Louis extends eastward from Indianapolis and passes through Urbana, Ohio, where it crosses the Atlantic &

Great Western Railway; this last named road runs north-eastwardly from Urbana and finally crosses the Erie Railway at Salamanca, New York, and the Erie Railway runs from thence to Jersey City.

In January and February, 1873, the Erie & Pacific Despatch in sending its freights from St. Louis to New York had them sometimes transported over the defendant's road and sometimes over the Ohio & Mississippi Railroad.

If the defendant took the Despatch freights it transported them to Indianapolis and there collected and received pay only for carrying them from East St. Louis to Indianapolis, and at Indianapolis it delivered the freight for further transportation to such other roads as the Erie & Pacific Despatch would then and there direct.

Record pages 28 and 19.

Sometimes the Despatch Company ordered the freights forwarded from Indianapolis over the Pittsburgh, Cincinnati & St. Louis Railway. At other times it ordered them forwarded over the Junction road to its intersection with the Atlantic & Great Western and thence by the last named road and the Erie to New York.

Record page 14.

The Erie & Pacific Despatch's agreement for the transportation of its freights was made with each road separately; sometimes it was reduced to writing, sometimes it was not. The agreement between it and defendant was oral; between it and the Erie the agreement was in writing, but both were in substance the same.

The Erie agreement is given in full in the finding and in brief is as follows :

The Erie agreed to transport all through freights secured by the Erie & Pacific Despatch passing between certain named points and to receive, load and unload, deliver and way-bill and furnish daily a copy of each way-bill of both eastward and westward bound freight; the Erie to assume all the risks of common carriers and to pay all damages to or loss of property while on their line of road or in their possession, and in case the loss or damage could not be definitely located the Erie to pay such loss in proportion to what it received for transporting the freight lost, subject, however, to the liability limitation contained in the bills of lading of the Erie & Pacific Despatch.

The Erie was to run all through freight trains so as to enable the Despatch company to deliver freight between competing points in the East or West as quickly as is done by any other competing line or road; was

to give the Despatch Company at all times as low rates as were given to any other line running over the Erie road; was to prorate any rate on east bound freight made by authority of the road leading from the point if such road had authority to make through rates over the Erie road, and was also to prorate all losses, damages and rebates that were prorated with any other line running over the Erie Railroad.

The Erie & Pacific Despatch on its part agreed to establish and maintain at its own expense independent and efficient agencies for soliciting and procuring freight in the cities of New York and Boston and other cities in the East or West as might be deemed necessary.

It was to maintain the authorized rates of the Erie and be governed in the transportation of through business by any obligation entered into by the Erie with competing lines for the maintenance of rates.

It was to issue its own bills of lading to shippers subject as to rates to the current through rates of the Erie.

In consideration of the mutual benefits to be derived by the parties it is then stipulated that the Erie will pay to the Erie & Pacific Despatch a commission as follows:

On West bound freight, first, second and third class, fifteen per cent. of the Erie's gross earnings as per their way bills; and ten per cent. on fourth and special class freight.

On East bound freight the commission is placed at ten per cent. for first and second class and eight per cent. for fourth and special class freight.

Record page 16.

There are several lines of Railroad between St. Louis and New York and among them the route formed by the line of the defendant to Indianapolis, the line of the Pittsburgh, Cincinnati & St. Louis from Indianapolis to Urbana; the Atlantic & Great Western from Urbana to Salamanca and from thence the Erie to New York.

There is also a route composed of the line of the defendant to Indianapolis; the Pittsburgh, Cincinnati & St. Louis from there to Pittsburgh and the Pennsylvania Road thence to New York.

By this last named route the defendant made its through shipments to New York in the absence of a special contract or instructions from shippers.

The gauge of the Erie and Atlantic & Great Western is, or was

then, different from that of the defendant's road and the Pittsburgh, Cincinnati & St. Louis and consequently in shipments of freight passing over these four roads re-shipment of goods was necessary at Urbana.

The several Railroads constituting the various lines between St. Louis and New York had an arrangement between themselves in 1873 and for seven or eight years before, whereby the general freight agents of the roads terminating at St. Louis made what was called a joint tariff to New York, fixing through rates which were divided among the several roads constituting a through line according to the distances the goods were to be carried by each road upon the basis of the shortest line. Losses occurring on through shipments not located were pro-rated between the roads in the same ratio as the freight money was divided; but if located they were as between the roads to be paid by the road on which they occurred.

Record page 13.

On October 21st 1872 one of these joint tariffs was published and took effect. It was entitled:

"Joint rates of transportation from St. Louis via Toledo, Wabash & Western; Ohio & Mississippi; Chicago & St. Louis; St. Louis, Vandalia, Terre Haute & Indianapolis; Indianapolis & St. Louis; St. Louis & Southeastern and St. Louis, Belleville & Southern Illinois Railroads."

This tariff was signed by the general freight agents of the several roads named; H. W. Hibbard being the agent of the defendant; and by this tariff which continued in force until after the loss complained of in this case occurred "all rail rates in cents per hundred pounds on compressed cotton from St. Louis and Belleville to New York" were fixed at 90 cents.

Record page 14.

On through shipments from St. Louis to Liverpool the Despatch company gave a through rate by getting from the general freight agent of the road by which the freight was to be shipped from St. Louis the inland or rail rate; or they took the rate as fixed by the joint tariff; and to this they added the ocean rate given by the steamship company. The steamship company assumed no inland risks and paid no commission or compensation of any kind; and the Liverpool rates as given by the Despatch company never exceeded the sum of the inland and ocean rates.

Meier & Co., of St. Louis had previous to 1873 been large shippers of cotton by the Erie & Pacific Despatch and had received many bills of lading from that company.

About January 20th and February 18th, 1873, they made in St. Louis two agreements with the Erie & Pacific Despatch for the shipment of two lots of cotton from St. Louis to Liverpool, which agreements were in effect that the cotton was to be transported to Liverpool for a through rate expressed in English money.

Nothing was said as to what route the cotton should take from St. Louis to the seaboard.

At the times the agreements were made Meier & Co. either delivered to the agent of the Erie & Pacific Despatch the receipts of the ware house in St. Louis where the cotton was stored, commonly called cotton notes, or gave an order for the cotton to such agent.

On January 22nd, 1873, and February 19th, 1873, the Erie & Pacific Despatch gave orders to the St. Louis Transfer Company for the cotton, and the Transfer Company took the same in their wagons across the Mississippi river to the city of East St. Louis and there delivered it to the defendant on account of the Erie & Pacific Despatch.

These two lots of cotton were marked respectively V. I. C. and P. I. G.; the first lot, containing 567 bales, was delivered to the defendant during January 27th, 28th and 29th, 1873; the last lot, containing 1,047 bales, was delivered to the defendant during the 19th, 20th, 21st, 22nd, 23rd and 24th days of February 1873.

At the making of each of the aforesaid agreements, Theodore Meier, of the firm of Adolphus Meier & Co., applied to the agent of the Erie & Pacific Despatch at St. Louis for the through rate to Liverpool on the cotton; the agent telegraphed to the White Star Line at New York for the ocean rate, added that to the inland rate and gave Mr. Meier the through rate.

In each case the only conversation was as to the through rate expressed in English money. Nothing was said about any exceptions or reservations respecting the liability of the carrier or the routes to New York. The owners of the cotton had no knowledge of the arrangements between the railroads and the Erie & Pacific Despatch, as before set forth. Meier only knew that the cotton was to go to New York, and thence by the White Star Line to Liverpool.

Record pages 19 and 20.

It was understood, however, at the time the arrangements about the rates were being made, that bills of lading for the cotton should be given them, and accordingly, in the usual time, they did receive bills of lading for both lots; the one for the V. I. C. lot being dated January 30th, 1873, and the P. I. G. lot February 28th, 1873.

Theodore Meier, who alone made the contracts relative to this cotton, took the bills of lading, but did not read them further than to see that in the written parts the description, rate, weight, destination, consignors and consignees were correctly stated.

He never knew that the bills contained any special provisions limiting the carrier's liability until after the loss complained of had occurred; nor did any of the firms owning the cotton know of these provisions. Although Meier expected to get bills of lading, there was no conversation on the subject, or as to the terms they should contain, nor routes to New York.

Record page 25.

The bills of lading appear in full in the finding.

Record pages 21 to 25.

They are entitled: "Through bill of lading, No. —, of the Erie & Pacific Despatch and the Oceanic Steam Navigation Company, from St. Louis to Liverpool, calling at Queenstown."

Both bills provide *inter alia* "that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor, in whose actual custody the same may be at the time of the happening of such loss, detriment or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods."

And also the following clause:

"NOTICE.—In accepting this bill of lading, the shipper or other agent of the owner of the property, expressly accepts and agrees to all its stipulations, exceptions and conditions."

Both bills likewise contain a clause exempting the Erie & Pacific Despatch and its connections from any liability for loss by fire whilst the property is in transit or while in deposit or place of transshipment or at depots or landings at all points of delivery.

The lot of cotton marked V. I. C., was forwarded from East St. Louis by defendant between January 29th and February 1st, 1873; the P. I. G. lot between February 20th and March 1st, 1873.

Record page 20.

The St. Louis Transfer Company, when they received the cotton from the Erie & Pacific Despatch, gave the Despatch receipts therefor, and when they delivered it to the defendant they furnished dray tickets which indicated that the cotton was consigned by the Erie & Pacific Despatch to C. G. Meier & Co., London.

Record page 19.

The cotton was loaded by the defendant on its own cars and transported by defendant from East St. Louis to Indianapolis.

The way-bills of defendant were only from East St. Louis to Indianapolis.

From Indianapolis the cotton was taken by the Pittsburgh, Cincinnati & St. Louis Railroad to Urbana in the same cars in which it was first loaded.

At Urbana it was loaded in other cars suited to the change of gauge and proceeded then over the Atlantic & Great Western and Erie Railways to Jersey City.

The lot marked V. I. C. began to arrive at Jersey City February 10th, 1873, and continued to arrive almost daily until March 19th, 1873, when all of it had arrived.

The lot marked P. I. G. commenced arriving at Jersey City March 2nd, 1873, and continued arriving until the end of the month.

Record pages 20 and 21.

Immediately upon the arrival of each car at the Erie freight house in Jersey City, notices of such arrivals were served upon the agents of the Erie & Pacific Despatch in New York in the form given in the Record at pages 17 and 18.

In red print across the notices was printed the following: "If any consignee shall within twenty-four hours after the receipt of this notice notify the Erie Railway Company at the Collector's office, Jersey City, alongside what vessel he desires this freight delivered, the Company will make the delivery."

"If such notice shall not be given within the twenty-four hours the freight will be warehoused at the risk and expense of the owner."

According to the custom that had prevailed in New York for more than ten years prior to 1873, no steamship would receive freight on its dock unless accompanied by a permit from the freight agent of the steamship company.

The Erie Railway Company could not, therefore, deliver the cotton involved in this case without a permit from the Agent of the White Star Line, and such permit it was the uniform practice of the Erie & Pacific Despatch to furnish to the Erie for freight shipped by the Despatch or to its care or on its account, and having obtained permits for such freights as they desired delivered at the White Star Dock, the Despatch Company would send the permit with the notice of arrival of such cotton as they desired shipped as an order to the Erie Railway to deliver the cotton mentioned in such notice to the steamship designated in the permit, and the Erie thereupon would immediately deliver the specified cotton to the White Star Dock.

Record pages 27 and 18.

In making deliveries to the steamship dock the Erie Railway Company employed a Lighterage Company which carried the freight in boats from the Erie Dock to the White Star Dock, about 723 feet distant.

On March 21st, 1873, an accidental fire occurred upon the docks of the Erie Railway at Jersey City.

A part of the cotton heretofore referred to had been delivered to the White Star steamers, but 780 bales there of were then stored in the freight house of the Erie, awaiting delivery to the steamship company.

Record page 26.

This cotton had not been delivered because the Erie & Pacific Despatch had failed to get the necessary permits and order the cotton delivered.

Record page 27.

The Erie Railway were ready and able to deliver the cotton as it arrived.

In cases of freight like this the Erie Railway Company treated the Despatch Company as the consignee in New York, and held the freight subject to the order of the Despatch Company.

Record page 28.

The freight house where this cotton was stored was a suitable and

proper place for the storage of cotton, and the fire occurred without any fault or negligence on the part of the Erie Railway Company, and every possible exertion was made to save the cotton and extinguish the fire.

Record page 26.

However, 721 bales out of the 780 on the dock at the time of the fire were burned.

The cotton burned had been unloaded and stored for various periods prior to the fire, ranging from 1 to 15 days.

Record page 27.

In the ordinary course of transportation the lot of cotton marked V. I. C. ought to have arrived in Jersey City and been delivered by Feb. 15, 1873, and the lot marked P. I. G. ought to have arrived there and been delivered by March 13, 1873.

The value of the V. I. C. cotton destroyed on Feb. 15, 1873, was \$13,322.41; the value of the P. I. G. cotton destroyed was on March 13, 1873, \$54,119.57.

After the loss occurred the two firms, A. and C. G. Meier & Co., for valuable consideration assigned to plaintiff all their damages and right of action therefore against the defendant and all other carriers; the plaintiff being the insurer for Meier & Co.

Upon these facts the Court entered judgment for the defendant.

BRIEF.

The bare statement of this case would seem to be a sufficient argument in support of the judgment below.

The special finding clearly shows :

1st. That the Erie & Pacific Despatch was a common carrier.

Bank, &c. vs. Adams Express Co., 93 U. S., 174.

Buckland vs. Adams Express Co., 97 Mass., 124.

Sweet vs. Barney, 23 N. Y., 335.

Christenson vs. American Express Co., 15 Minn., 270.

2d. That Meier & Co. delivered their cotton to the Erie & Pacific Despatch and not to the defendant.

3d. That the agreement for the carriage of the cotton was between the Despatch and Meier & Co. and not between Meier & Co. and the four railroads named in the petition.

4th. That this contract was for carriage to Liverpool from St. Louis for a through rate expressed in English money.

5th. That the Erie & Pacific Despatch employed defendant to haul the cotton from East St. Louis to Indianapolis and there deliver it to the Pittsburgh, Cincinnati & St. Louis Railroad.

6th. That the defendant carried the cotton safely to Indianapolis and there delivered it, under orders from the Erie & Pacific Despatch, to the Pittsburgh, Cincinnati & St. Louis Railroad.

Under this state of facts the defendant is certainly not liable.

But the plaintiff in error claims the right to recover of the defendant upon the theory that the Erie & Pacific Despatch was the agent of the four roads over which the cotton passed; that the contract between Meier & Co. and the Despatch was the contract of those four roads and a through contract; that the contract was oral and the bills of lading of no validity, and that there was negligent delay in carrying the cotton, which caused the loss.

In behalf of the defendant it is respectfully submitted that the special finding utterly fails to establish this theory or any constituent part thereof.

The Erie & Pacific Despatch was not the agent of the four roads over which the cotton passed; but on the contrary was the principal. It made the contract with Meier & Co. and those roads were employed by it to perform a part of the service it had agreed to render Meier & Co.; each road performing a specific service provided for in its separate contract with the Erie & Pacific Despatch.

Thus the defendant's contract required it to haul *over its own line* freight furnished by the Erie & Pacific Despatch; the Pittsburgh, Cincinnati & St. Louis, by its contract, was to haul such freight *over its line*; and so, also, with the Atlantic & Great Western and the Erie, *over their respective lines*.

There is nothing in the record to justify the inference that the defendant or either of the other roads ever agreed to deliver Erie & Pacific Despatch freight beyond their respective termini.

It is stated expressly in the finding that when the defendant hauled east bound freight for the Erie & Pacific Despatch it held the freight at Indianapolis, subject to the orders of the Despatch as to delivery to another road.

Record page 19.

The defendant never received pay except for the carriage over its line.

Record page 19.

It never billed the freight beyond Indianapolis.

Record page 19.

In making shipments east from St. Louis, as in shipping the cotton in question, the Despatch decided the route it was to take.

Sometimes shipments were made by the Ohio & Mississippi; sometimes by the defendant.

At Indianapolis the Despatch Company again determined the route, and sometimes selected the Pittsburgh, Cincinnati & St. Louis road; sometimes the Junction road.

Record page 14.

At New York the Erie & Pacific Despatch always paid the freight on foreign bound shipments, and controlled deliveries to the steamships.

Record pages 19 and 27.

Meier & Co. shipped by the Despatch "as a matter of convenience;

because it was necessary to have some one to look after the cotton in New York and pay inland freight on it there; Meier & Co. had no office or correspondent in New York, but the Erie & Pacific Despatch did have an office there, and Meier & Co. expected the Despatch Company to look after the cotton when it got there, and see that the inland charges on it were paid."

Special finding. Record page 25.

Meier & Co. delivered the cotton to the Despatch Company; not to the defendant.

Record page 19.

The Erie & Pacific Despatch delivered the cotton to defendant, and was named as consignor in the shipping tickets.

Record page 19.

These facts entirely controvert the theory that the Despatch Company was the agent, and show conclusively that the Railroads selected by the Despatch Company to carry its freights were the agents, and the Despatch Company, the principal.

In the case of the Bank, &c. vs. Adams Express Company (93 U. S. 174) this Court holds that the Railroads are the Agents of the Express Companies.

The same principle applies to the case at bar.

It is claimed, however, by the learned counsel for plaintiff in error, that the relations between the Despatch Company and the Railroads establish the agency on the part of the Despatch Company, because the Despatch performed labor or service for the Railroads in keeping competing lines from getting business; because, also, the Despatch could make no rate over the roads, except as authorized; because the roads collected the freight themselves; because the roads paid a commission; and because the Despatch was not a common carrier.

It is true that the Despatch Company could not make rates over the railroads. In this respect it occupied the position of every other shipper or carrier. No carrier can make rates for another unless authorized; neither can a shipper make a rate for himself without authority.

An agent, however, appointed to solicit and forward freight and keep competing lines from getting the business would certainly have some authority and discretion about making rates.

It is true also that the roads with which the Despatch Company had contracts paid, *severally*, what was called a commission and that the roads usually collected the freight from consignees.

The object in thus transacting the business is apparent. The gross freights earned by each road was to be divided between the Despatch Company and the railroads respectively in proportions fixed by the several contracts and was collectable from the consignees on delivery. Inasmuch as the railroads were to receive the larger proportion of the money and the last carrier would make delivery it was certainly more direct for the last road to collect on delivery and pay the Despatch Company its share than for the Despatch Company to be notified of delivery, then make the collections and afterwards distribute the larger proportion of the money to the railroads.

The fund to be collected was to be divided between the Despatch Company and the several roads.

It certainly makes no difference which one of the parties entitled to a distributive share makes the collection and distribution.

The consignees would owe the freight to the Despatch company on delivery.

The carrier making the delivery, *as agent for the Despatch Company*, collects on delivery and after retaining what is due for its carriage of the freight gives to the Despatch Company what it is entitled to.

The effect of this division of money between the railroads and the Despatch Company was to give to the Despatch a lower rate of freight than was charged ordinary shippers.

The roads considered they could do this to advantage because of the large amount of freight the Despatch Company would control through its officers and agents located at different points and in all parts of the country.

Desiring to maintain rates the railroads would not agree to haul the Erie & Pacific Despatch freights below the usual tariff rates.

They accomplished their purpose by charging the usual rates and then returning to the Despatch a portion of the freight money as a rebate or commission.

These rebates, commissions or drawbacks are often given to large shippers.

No one would contend, however, that such a payment would constitute the shipper an agent of the Railroad.

The facts relied upon by plaintiff in error to establish the agency of the Erie & Pacific Despatch, instead of doing so, all tend to establish the agency of the Railroads, and put the Despatch in the principal's place.

The Despatch Company solicits freight, makes its own contract with the owner as to rates, selects and *controls* the route the freight shall take, and controls its delivery at New York. In doing all this the Railroads are totally without authority, except as to one particular, viz: They will not haul the Erie & Pacific Despatch freight *below* the tariff rates.

When the freight is delivered, the carrier making the delivery, as agent for the Despatch Company, collects of the consignee the money which the consignee had agreed to pay the Erie & Pacific Despatch, and, after retaining its proper share, pays the principal the amount due it.

The "labor and services" performed by the Despatch Company, in getting freight, would result in mutual benefit to the Despatch and the road over which it shipped the freight.

The Despatch Company, owning no road, says to a Railroad Company: "We intend to solicit and control a large amount of freight. What rates will you give us if we ship over your line?"

The road says: "We can only give you current rates, but if you patronize us and give us your freights, we will give you a rebate."

Thus a rate is fixed, but the Despatch Company remains the shipper of the freight, controls it, and becomes the patron of the road to which it gives the freight for carriage.

Counsel for plaintiff in error says the Despatch Company was not a common carrier and cannot be likened to an Express Company because it paid the railroads nothing but received on the contrary pay from the railroads.

The answer to this is plain.

The money collected by the last carrier from the consignee was money due to the Despatch Company under its contract with the shippers, and with this money the carrier pays itself the amount it had agreed to charge the Despatch for hauling its freight and pays the Despatch the commission it had agreed to pay that company for its patronage.

In the case of an Express Company the railroads charge less than tariff rates and transport messengers free.

The Express Companies deliver their own parcels and collect on delivery for themselves and pay the railroads what they agree to pay.

This is the most convenient course for both parties because the party making delivery is best situated to make collections; just as in the case at bar the last carrier can best make collections because it makes the delivery.

The Despatch Company was undoubtedly a common carrier; was undoubtedly the shipper of the cotton in this case; was undoubtedly the principal in the contract with Meier & Co., and the roads were undoubtedly the agents.

But if, for the sake of argument, it be conceded that the Despatch Company was an agent,—the question then arises who were the principals? And what was the scope of the agency?

There is no pretense that there was any joint agreement between the Railroads and the Despatch Company. Each road had its own contract, without reference to any other road.

Each road made its own settlements without regard to the other road.

It is distinctly stated that each road only contracted to haul the freight given it by the Despatch over its own line.

If then any agency existed, it was a separate, and not a joint agency; and the scope of each agency was confined to the line of the road making the contract.

If in making the contract then with Meier the Despatch was acting as an agent it was certainly as *the separate agent of four distinct and separate roads, each with a well-defined and separate obligation and neither liable for the acts or omissions of the others.*

This certainly must be correct; for the scope of the agency and the authority of the agent could not be enlarged in favor of one dealing with the agent as a principal and not as an agent.

If it is sought to charge an undisclosed principal upon the contract of an agent made in the agent's own name there is no authority for saying that the principal can be held upon contract made by the agent, beyond the scope of his authority.

If the Erie & Pacific Despatch was the principal in the contract with Meier & Co., and the several railroads were simply employed to haul the cotton over their respective lines, then defendant fully performed its duty when it delivered the cotton at Indianapolis to the Pittsburgh, Cincinnati & St. Louis Railroad, and the judgment below should be affirmed.

If, on the other hand, the Erie & Pacific Despatch, in contracting with Meier, acted as an agent, it was as agent for four undisclosed principals, and the contract thus made would only require of the defendant the safe carriage and delivery of the cotton at Indianapolis to the Pittsburgh, Cincinnati & St. Louis Railroad.

This the defendant did, and in this view of the case, too, the judgment should be affirmed.

In bringing this action, the plaintiff in error must claim through and therefore adopt the contract between the Erie & Pacific Despatch and the defendant.

New Jersey Steam Navigation Co. vs. Merchants' Bank,
6 How. (U. S.) 381.

Bank of Kentucky vs. Adams Express Co., 93 U. S. 174.

Having fully complied with this contract, the defendant cannot be held liable for loss or damage occurring long after such compliance.

There was no contract for a through shipment of the cotton, except the contract made by the Erie and Pacific Despatch.

If that contract was not defendant's contract then the plaintiff cannot recover against the defendant upon such contract.

The agreement made by the Erie & Pacific Despatch was to carry the cotton to Liverpool at a through rate from St. Louis expressed in English money.

There is nothing in the finding to indicate in the slightest degree that the Despatch was ever authorized by the defendant or any other railroad company to make a contract to carry freight from St. Louis to Liverpool.

This contract was therefore clearly not the contract of the defendant.

It almost seems unnecessary to discuss this point any further but counsel for plaintiff in error seems to lay great stress upon the fact that a rate to New York was published by the defendant in a tariff and that

in shipping from St. Louis to New York the railroads over which the freight passed divided the through rate according to the distance each hauled the freight.

I am unable to see what this has to do with the case at the bar.

The plaintiff sues upon an express agreement to carry from St. Louis to the White Star Dock, Jersey City, alleged to have been made between Meier & Co. and a continuous line of railroads, of which defendant was one.

The special finding states the fact to be that the contract made was between Meier & Co. and the Erie & Pacific Despatch, and was for the carriage of the cotton from St. Louis to Liverpool.

Nothing in the finding authorizes the statement that any contract was made by any one or with any one to carry the cotton to the White Star Dock in Jersey City.

Counsel for plaintiff in error contends that the four roads over which the cotton passed, contracted with the Erie & Pacific Despatch to carry the cotton from St. Louis to the White Star Dock; but, unfortunately, the Court finds the fact to be otherwise.

It is clearly expressed in the finding that the Erie & Pacific Despatch had a separate contract with each of those four roads, and that each contract simply provided for hauling Erie & Pacific Despatch freight *over the line* of the road making the contract.

It is true that every road leading East from St. Louis joined in a tariff, which named a rate of freight on cotton, among other things, from St. Louis to New York, and it is true that the gross through freight thus named would be pro-rated between the roads hauling the cotton, according to the distance each hauled it; and it is also true that in case of an ordinary shipment of freight from St. Louis bound for Eastern points, the road first receiving the freight at St. Louis hauls it to its terminus, and then delivers it to some connecting road, and receives from that road its proportion of the through freight.

The second carrier takes the property to its terminus, and collects what it paid the first carrier and its own proportion of the freight from the third carrier, to whom it delivers the freight; the third carrier will then take the property to its terminus, say New York, and there collect from the consignee the whole freight.

This has become the universal mode of doing business where freight is to pass over several different Railroads.

It was not peculiar to the four roads that hauled this cotton, and therefore its use by those roads does not indicate any special arrangements between them.

In the absence of an agreement, express or implied, the carrier is only liable to the extent of his own route, and for safe storage and delivery to the next carrier.

Railroad Co. vs. Manufacturing Co., 16 Wall., 318.

Railroad Co. vs. Pratt, 22 Wall., 123.

Pratt vs. Railway Co., 95 U. S., 43.

Darling vs. Railroad Co., 11 Allen, 295.

Nutting vs. Railroad Co., 1 Gray, 502.

Burroughs vs. Railroad Co., 100 Mass., 26.

Pennsylvania Railroad Co. vs. Berry, 68 Pa. St., 272.

Root vs. Railway Co., 45 N. Y., 524.

Babcock vs. Railway Co., 49 N. Y., 491.

Perkins vs. Railroad Co., 47 Maine, 573.

Converse vs. Transportation Co., 33 Conn., 166.

Farmers' Bank vs. Transportation Co., 23 Vt., 209.

Brintnall vs. Railroad Co., 32 Vt., 673.

U. S. Express Co. vs. Rush, 24 Ind., 403.

McMillan vs. Railroad Co., 16 Mich., 119.

Hoagland vs. Railroad Co., 39 Mo., 451.

Coates vs. U. S. Express Co., 45 Mo., 238.

Snider vs. Adams Express Co., 63 Mo., 367.

Railroad Cos. vs. Pontius & Richmond, 19 Ohio St., 222.

Gray vs. Jackson. 51 N. H., 9.

In Darling vs. Railroad *supra* it is held that the custom of each carrier to collect the freight already earned of the next carrier to whom the goods are delivered along the extended line of transit assumes the separate liability of each company.

The bills of lading issued and accepted by Meier & Co. expressly confine the liability of each road to its own line.

This provision expressly negatives the idea of a through contract and rebuts the presumption that any of the roads intended to assume any more burdens than the law would impose upon them.

Railway Co. vs. Bank, 20 Wis., 122.

Schneider vs. Evans, 25 Wis., 241.

Pennsylvania Railroad vs. Schwarzenberger, 45 Pa. St., 208.

McCarty, et al., vs. Railway, 30 Pa. St., 247.

Railroads vs. Pontius, et al., 19 Ohio St., 222.

The naming of a through rate does not imply a through contract.

Edwards on Bailments, Sec. 581, and notes:

Lamb vs. Railroad Co., 46 N. Y., 282.

Railroad Co. vs. Forsyth, 61 Pa. St., 81.

Hood vs. Railroad Co., 22 Conn., 1.

Converse vs. Transportation Co., 33 Conn., 166.

Gray vs. Jackson, 51 N. H., 9.

Snider vs. Adams Express Co., 63 Mo., 367.

Schneider vs. Evans, 25 Wis., 241.

Washburn Co. vs. Providence &c. Co., 113 Mass., 490.

In Snider vs. Express Co. *supra* the *dictum* cited by the plaintiff's counsel from the Coates case in 45 Mo. is fully explained.

In Gray vs. Jackson *supra* the New Hampshire cases cited by counsel for plaintiff in error are fully reviewed.

It is impossible to conceive how it will benefit the plaintiff in error to establish the third proposition advanced by its counsel, viz: that the contracts of carriage were oral and without liability limitations, and that, therefore, the bills of lading are not binding between the parties.

The only oral contract disclosed by the record, is the one made by Theodore Meier with the Erie & Pacific Despatch, and this was a contract to carry to Liverpool for a through rate, expressed in English money.

The plaintiff, however, declares upon a *special* contract, made with the four lines named in the petition, to carry to the White Star Dock at Jersey City.

No such contract was found to exist.

It is a maxim that the plaintiff must recover, if at all, *secundum allegata et probanda*.

The plaintiff can not certainly declare upon a special contract, made with A, B, C, and D, to carry from St. Louis to the White Star Dock at Jersey City, and recover on proof of a contract made with E, to carry from St. Louis to Liverpool, for a specified sum.

But, conceding, for the sake of argument, that the Erie & Pacific Despatch, in making the Liverpool contract, was acting in the capacity of an agent, the contract it made, as a *whole*, must be apportioned between the undisclosed principals, according to the authority the agent had to bind those principals respectively.

The finding clearly states, as has been before shown, that the Despatch's contract with each of the Railroads was separate, and provided only for shipments over *the line of each road*.

If, then, the *entire* oral contract be apportioned and divided, it becomes the contract of defendant to carry to Indianapolis; of the Pittsburgh, Cincinnati & St. Louis to carry to Urbana; of the Atlantic & Great Western to carry to Salamanca; of the Erie to carry to Jersey City, and deliver to the White Star Line, and of the White Star Line to carry to Liverpool.

The finding shows that defendant performed its part of this contract, and is, therefore, not liable.

But it is clear to my mind that the oral contract was merged in the written contracts or bills of lading, and that the rights of the parties must be determined by those bills.

Meier & Co. had made many shipments by the Erie & Pacific Despatch, and had always received bills of lading.

It was understood when the oral contracts were made that they were to receive bills of lading for this cotton, and in the usual time they did receive them.

Theodore Meier, one of the firm, examined the bills, and read thereon the rates, weights, consignees, and destination.

If he did not read any more, it was his own fault.

He does not pretend that the bills were different from those he expected to get.

They were given him in pursuance of an agreement to furnish bills of lading, and if they did not suit him it was his duty to refuse them and demand such bills as the agreement called for.

He accepted the bills, however, and with this clause printed in plain type, viz:

"NOTICE.—In accepting this bill of lading the shipper or other agent of the owner of the property carried expressly accepts and agrees to all its stipulations, exceptions and conditions."

The law will not certainly permit Meier & Co. to say at this late day that the bills were not binding upon them.

It is unnecessary to discuss the cases cited by counsel for plaintiff upon this point. None of them present facts like the case at bar, and they are not therefore applicable.

The bills of lading are not relied upon to relieve the defendant of any common law liability.

The defendant does not seek to evade the consequences of its negligence or that of its agents by reason of any restrictions contained in the bills.

It simply invokes the aid of the bills to show clearly and emphatically that its common law liability to carry only to the end of its route has not been extended in the least.

Each bill of lading expressly stipulates that in case of loss or damage to the property specified therein "*That company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss,*" &c.

Record pages 22 and 24.

Such a stipulation as this has often been upheld.

C., H. & R. R. D. Co. et al., vs. Pontius and Richmond,
19 Ohio St., 222.

Detroit, &c. R. R. vs. Bank, 20 Wis., 122.

Scheider vs. Evans, 25 Wis., 241.

Pennsylvania R. R. Co. vs. Schwarzenberger, 45 Pa.
St., 108.

This point alone is sufficient to defeat the plaintiff.

In answer to that portion of brief for plaintiff claiming negligent delay in transportation it is submitted that the delay does not appear to have occurred on defendant's line; that the delay was not the proximate cause of the loss; that when the loss occurred the cotton destroyed was held by the Erie Railway as warehouseman and not as carrier, and that the fire was purely accidental and not the result of any negligence.

At the time of the fire there were stored in the warehouse of the Erie at Jersey City 780 bales of cotton.

Notices of the arrival of all these bales had been given to the Erie & Pacific Despatch and they were left loaded on the cars for various periods after giving the notices, the time ranging from one to ten days.

Record page 27.

Receiving no order to deliver to the steamship, the Erie stored these 780 bales in its warehouse on Long Dock, "a suitable and proper place for the storage of the cotton."

Record page 26.

These 780 bales had been unloaded and stored before the fire, as follows:

	65 bales, 15 days.
35	" 9 "
357	" 7 "
273	" 3 "
50	" 1 day.

Record page 27.

"The fire occurred without negligence on the part of the Erie Railway Company, and every possible exertion was made to save the cotton."

Record page 26.

The Erie Railway was able and ready to deliver the cotton as it arrived, and the Steamship Company asked the Erie & Pacific Despatch to deliver it, but the Despatch failed to get steamship permits, and the Erie could not deliver without such permits.

Record pages 27 and 28.

The notices of arrival given to the Erie & Pacific Despatch stated that if notice to deliver to the ocean vessels was not given within twenty-four hours from receipt of the notice the freight would be warehoused at the risk and expense of the owner.

Record page 18.

The cotton thus stored in the Erie warehouse awaiting delivery was held by the Erie as warehouseman and not as carrier.

Bausemer, *ét al.*, vs. Toledo & Wabash Railway, 25 Ind.,

Norway Plains Co. vs. Boston & Maine Railway, 1 Gray (Mass.), 263.

St. Louis &c. Railway Co. vs. Montgomery, 39 Ills., 335.

Richards vs. Michigan Southern Railway, 20 Ills., 404 and 407.

Moses vs. Boston & Maine Railroad, 32 N. H., 523.

Semke vs. Chicago &c. Railroad, 39 Wis., 449.

Hutchinson on Carriers, Sec. 355.

Angell on Carriers, Sec. 302, 3.

It cannot be successfully maintained that the Erie & Pacific Despatch's delay in having the cotton delivered to the steamship was the delay of an agency of the Erie.

It is clearly stated in the special finding that according to the method of doing this Erie & Pacific Despatch business the Erie could not deliver to the steamship without orders from the Despatch.

Record page 27.

It is also stated in the finding that Meier & Co. shipped by the Erie & Pacific Despatch with the express purpose of having the Despatch Company "look after the cotton in New York and see that the inland charges on it were paid."

Record page 25.

The ordinary and customary manner of handling and delivering these Erie & Pacific Despatch freights, entered into, and formed a part of the contract between Meier & Co. and the Erie & Pacific Despatch.

McCarty vs. Railroad Co., 30 Pa., State. 247—253.

Angle vs. Railroad Co., 9 Iowa, 487.

Schneider vs. Evans, 25 Wisconsin, 241.

Bliven vs. Screw Co., 23 How. (U. S.) 432.

Dixon vs. Dunham, 14 Ill., 324.

Bank vs. Transportation Co., 18 Vt., 131; and 23 id., 186.

Loveland vs. Burke, 120 Mass., 139.

The proximate cause of the loss of the cotton was the fire.

Inasmuch as the liability of the Erie, as carrier, had ceased at the time of the fire, and the fire not being the result of negligence, the plaintiff cannot recover for the cotton.

The fact that there was delay in the transportation does not alter the case.

Railroad Co. vs. Reeves, 10 Wallace, 176.

In conclusion it is submitted that the plaintiff is not entitled to recover in this action because :—

I.

There is no contract shown requiring the defendant to carry the cotton from St. Louis to the White Star Dock, Jersey City.

II.

The record shows conclusively that the defendant only agreed to carry the cotton to Indianapolis and that it did so carry the cotton and deliver it safely, under orders from the Erie & Pacific Despatch, to the Pittsburgh, Cincinnati & St. Louis road.

III.

The acceptance of the bills of lading by Meier & Co. precludes the plaintiff, as their assignee, from maintaining this action against the defendant; the stipulation in the bills being that that company upon whose line any loss might happen should be alone responsible therefor.

IV.

Even if it could be held that the defendant contracted to carry the property to the terminus of the Erie Railway in Jersey City and then deliver it to the White Star steamer, the record clearly shows that this carriage was complete, and the delivery prevented solely by the Erie & Pacific Despatch, an agency selected by Meier & Co., to look after the cotton in New York and pay charges on it. Under these circumstances the liability as carrier ceased; and the defendant cannot be held liable as warehouseman because the cotton was stored in a suitable and proper house, the fire was purely accidental, not the result of negligence, and every exertion possible was made to save the cotton.

The judgment below should be affirmed.

Respectfully submitted,

JNO. G. WILLIAMS,

Counsel for Defendant in Error.

14-157

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~308.~~ 64

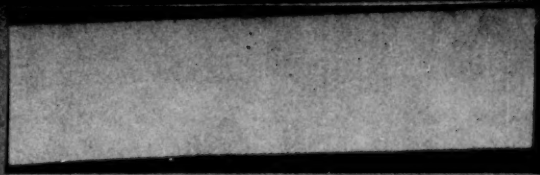
ERWIN DAVIS AND J. N. H. PATRICK, PLAINTIFFS IN ERROR,

VS.

WELLS, FARGO & COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 21, 1878.



SUPREME COURT OF THE UNITED STATES.

No. 308.

ERWIN DAVIS AND J. N. H. PATRICK, PLAINTIFFS IN ERROR,

VS.

WELLS, FARGO & COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

INDEX.

	Original.	Print.
Complaint.....	1	1
Answer.....	4	3
Verdict.....	7	5
Judgment on verdict.....	8	5
Notice of intention to move for new trial.....	9	5
Exhibit A, letter of Dooley, agt., to Davis.....	10	6
Exhibit B, guarantee.....	11	6
Henry Wadsworth, examination....	12	7
William S. McCormick, examination.....	17	9
Lewis S. Hills, examination.....	17	10
J. E. Dooley, examination.....	18	10
Alf. Eoff, examination.....	20	11
Jo. Gordon, examination.....	24	13
J. R. Walker, examination.....	26	15
B. G. Raybould, examination.....	26	15
Henry Wadsworth recalled.....	27	15
Exhibit 1, memorandum check.....	27	16
Erwin Davis recalled.....	28	16
J. N. H. Patrick recalled.....	28	16
Plaintiffs' instructions.....	29	17
Defendants' instructions.....	29	17
Assignment of errors.....	33	19
Motion for new trial.....	35	20
Order overruling motion for new trial.....	37	21
Assignment of errors.....	37	21
Hearing in supreme court.....	40	23
Judgment in supreme court.....	41	23
Opinion in supreme court.....	43	23
Affidavit of service of citation.....	51	26
Citation.....	52	26
Writ of error.....	54	27
Bond.....	56	27
Certificate of clerk.....	60	29

a Pleas before the honorable Michael Schaeffer, chief justice, Philip H. Emerson and Jacob S. Boreman, associate justices of the supreme court of the Territory of Utah, at the January term of said court, held at the city of Salt Lake, on the 11th day of February, 1878.

WELLS, FARGO & COMPANY, RESPONDENTS,
vs.
 ERWIN DAVIS AND J. N. H. PATRICK, AP-
 pellants.

b Be it remembered that on the 11th day of January, A. D. 1878, was filed in the office of the clerk of the supreme court of the Territory of Utah a transcript of the record and proceedings of and in the district court of the third judicial district of said Territory in a certain cause theretofore pending in said district court, in which Wells, Fargo & Co. was plaintiff and Erwin Davis and J. N. H. Patrick were defendants, which said transcript and endorsements thereon were in the words and figures following, to wit :

c *Transcript.*

Supreme court, Territory of Utah, January term, 1878.

WELLS, FARGO & Co., RESPONDENT,
vs.
 ERWIN DAVIS AND J. N. H. PATRICK, AP-
 pellants.

Marshall & Royle, respondents' attorneys.
 Bennett & Harkness, appellants' attorneys.

Filed in office of clerk of supreme court this 11th day of January, A. D. 1878.

E. T. SPRAGUE, *Clerk.*

Complaint.

In the district court of the third judicial district, Territory of Utah.

TERRITORY OF UTAH,
County of Salt Lake, ss :

WELLS, FARGO & Co., PLAINTIFF,
vs.
 ERWIN DAVIS AND J. N. H. PATRICK, DE-
 fendants.

And now comes the said plaintiff in the above-entitled action and explains and alleges :

That at the dates hereinafter named said plaintiff was, and that at this time said plaintiff is, a corporate body duly incorporated under and by virtue of the laws of the Territory of Colorado, and doing business as such corporation in the Territory of Utah ; that on the 11th day of November, A. D. 1874, said defendants made, signed, sealed, executed, and delivered to said plaintiff their certain contract and obligation in

writing, bearing date the day and year last aforesaid, which said contract and obligation in writing was in the words and figures following, to wit:

2 For and in consideration of one dollar to us in hand paid by Wells, Fargo & Co. (the receipt of which is hereby acknowledged), we hereby guarantee unto them, the said Wells, Fargo & Co., unconditionally at all times, any indebtedness of Gordon & Co., a firm now doing business at Salt Lake City, Territory of Utah, to the extent of and not exceeding the sum of ten thousand dollars (\$10,000), for any overdrafts now made or that may hereafter be made at the bank of said Wells, Fargo and Company.

This guarantee to be an open one and to continue one at all times, to the amount of ten thousand dollars, until revoked by us in writing.

Dated Salt Lake City, 11th Nov., 1874.

In witness whereof we have hereunto set our hands and seals the day and year above written.

ERWIN DAVIS. [SEAL.]
J. N. H. PATRICK. [SEAL.]

Witness:

JO. GORDON.

That from and after the delivery to plaintiff, as aforesaid, of said instrument in writing, a copy of which is above set forth, said Gordon & Co. continued to do business with and make overdrafts upon plaintiff at the bank of said Wells, Fargo & Co., in the city and county of Salt Lake, Territory of Utah; and that on the 31st day of July, A. D. 1875, said Gordon & Co. had made overdrafts upon and was indebted for overdrafts to plaintiff, at said bank, in the sum of \$6,200.90; and that being so indebted, on the day and year and at the place last aforesaid an account was then and there stated between said plaintiff and said Gordon & Co., upon said overdrafts at said bank, and that upon such statement a balance of \$6,200.90 was found to be, and was, due and owing from said Gordon & Co. to said plaintiff, and which said Gordon & Co. then and there promised to pay to said plaintiff; but that neither the said sum of \$6,200.90 or any part thereof, or any interest thereon, has been paid to said plaintiff by said Gordon & Co. or said defendants, except the sum of \$126.40 paid by said Gordon & Co. to plaintiff on the 9th day of February, A. D. 1876, of all which defendants hath had notice.

3 That said defendants are indebted to said plaintiff by reason of the premises in the sum of \$6,200.90, together with interest thereon from said 31st day of July, 1875, at the rate of ten per cent. per annum, less said credit of \$126.40, paid February 9th, 1876, payment of which has been demanded of defendants, but has not been paid, no part of which hath been paid, but is now due and owing from said defendants to said plaintiff. The said instrument in writing (a copy of which is herein contained) has never been revoked by said defendants, in writing or otherwise.

Wherefore plaintiff demands judgment against said defendants for said sum of \$6,200.90, together with interest thereon at the rate of ten per cent. per annum from said 31st day of July, 1875, less said sum of \$126.40 paid February 9th, 1876, and costs of suit.

MARSHALL & ROYLE,
Attorneys for Plaintiff.

TERRITORY OF UTAH,

County of Salt Lake, ss :

Alfred Eoff, being first duly sworn, upon his oath says: I hold the office and position of cashier to said plaintiff in said county of Salt Lake. I have heard read the foregoing complaint and know the contents thereof, and that the same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters I believe it to be true.

ALFRED EOFF.

Subscribed and sworn to before me this 27th day of May, A. D. 1876.
W. P. McBRIDE, *Clerk.*

(Endorsed :) Filed May 27th, 1876. W. P. McBride, clerk.

4

Answer.

Third district court.

TERRITORY OF UTAH,

County of Salt Lake, ss :

WELLS, FARGO & CO., PLAINTIFF,

*vs.*ERWIN DAVIS AND J. N. H. PATRICK, DEFEND-
ants.

Now come said defendants and in answer to the complaint herein admit the execution of the contract or obligation of guaranty referred to in said complaint, but deny that the same was by them, or either of them, delivered to plaintiff, and on the contrary say that the same was delivered by said defendants to Joseph Gordon, one of the members of the said firm of Gordon & Co., under the circumstances and conditions and for the purposes hereinafter set forth, to wit: That the said Gordon & Co. being desirous in the prosecution of their business to make overdrafts on said plaintiff, the said Joseph Gordon presented said obligation already drawn up and requested defendants, as an accommodation to said firm of Gordon & Co., to sign the same, which said defendants did accordingly, but said defendants nor either of them ever received the consideration of one dollar, nor any consideration whatever from plaintiff for executing said obligation, the only consideration therefor being the accommodation of Gordon & Co. That after so signing said obligation the same was placed in the hands of the said Joseph Gordon, to be used by his said firm of Gordon & Co. as a letter or obligation of credit, to obtain from plaintiff the privilege of making overdrafts. That the said Joseph Gordon afterwards, but at what date defendants have never been advised, delivered said obligation to plaintiff, and plaintiff, at the time of delivery to it, was fully aware of the objects and consideration for which said obligation was executed, and was fully aware of the manner in which the same was executed and afterwards delivered to the said Joseph Gordon as a letter or obligation of credit in favor of the said firm of Gordon & Co.

That notwithstanding the premises, said plaintiff wholly failed to notify the defendants, or either of them, of the delivery to plaintiff by Gordon & Co. of the obligation aforesaid, or that plaintiff had accepted the same, and intended in consideration thereof to act upon it by allowing

Gordon & Co. to make overdrafts, or that plaintiff ever did act on said obligation. Said defendants further say that they were never notified that Gordon & Co. had ever made any overdrafts on said plaintiff, and never knew that plaintiff claimed that any such overdrafts had been made until on the day of the institution of this suit. That neither plaintiff nor any one else ever gave defendants, or either of them, any notice or information whatever in relation to any matter or thing relating to or concerning said obligation after the delivery of the same as aforesaid to the said Joseph Gordon, nor informed nor notified defendants, or either of them, of any act, acts, or transactions had under or in pursuance of said obligation, except that on the day of the service of the summons in this suit, plaintiff presented to defendant, J. N. H. Patrick, for payment, the amount claimed in the complaint. Said defendants further say that when said obligation was delivered to said plaintiff it was agreed between it and Gordon & Co. that, in consideration of the delivery of said obligation, that Gordon & Co. should

6 have the right and privilege of making overdrafts on plaintiff to the amount specified in said obligation until the same should be revoked according to its provisions, and said obligation was executed and delivered to said Joseph Gordon for the sole object and purpose of securing and obtaining the favor and credit before set out. Yet, notwithstanding the premises, plaintiff, in violation of its agreement with Gordon & Co., which constituted the sole and only consideration moving from plaintiff for which said obligation was executed and delivered to it, violated the same by refusing to pay Gordon & Co. overdrafts made in pursuance of said contract. Said defendants, further answering, say that the said Gordon & Co. had not, on the 31st day of July, A. D. 1875, made overdrafts on plaintiff, and were not then, and are not now, indebted to plaintiff on overdrafts in any sum whatever. Said defendants further say that the stated account referred to in said complaint was not for any balance due on overdrafts of Gordon & Co., but for a balance not covered or secured by said obligation executed as aforesaid by these defendants, said account being, in fact, composed of items other than overdrafts, and contained charges of interest amounting to upwards of one thousand dollars, computed at two per cent. per month and compounded monthly.

Defendants, as before alleged, deny that they ever had any notice of any stated account prior to the commencement of this suit. Having fully answered the allegations of the complaint, defendants pray to be dismissed with their costs.

BASKIN & DEWOLFE,
Attorneys for Defendants.

TERRITORY OF UTAH,
County of Salt Lake, ss:

J. N. H. Patrick, being first duly sworn, deposes and says: I am one of the defendants in the above-entitled suit. I have heard the foregoing answer read and know the contents thereof, and the *the* same is true of my own knowledge, except as to matters therein stated on
7 information or belief, and as to those matters I believe it to be true.

J. N. H. PATRICK.

Subscribed and sworn to before me on the 14th day of October, A. D. 1876.

C. S. HILL, *Clerk.*

(Endorsed:) Filed Oct. 14th, 1876. C. S. Hill, clerk.

Verdict.

SALT LAKE CITY, Oct. 25, 1877.

WELLS, FARGO & CO. }
vs.
 DAVIS AND PATRICK. }

We, the jury in the above-entitled case, find a verdict for the plaintiff for the sum of \$7,462.33, seven thousand four hundred and sixty two dollars and thirty-three cents.

J. FRANCE, *Foreman.*

(Endorsed :) Filed Oct. 25th, 1877. C. S. Hill, clerk.

8

Judgment on verdict.

In the district court of the third judicial district, Territory of Utah, in and for the county of Salt Lake.

WELLS, FARGO & CO., PLAINTIFF,
vs.
 ERWIN DAVIS AND J. N. H. PATRICK, DE- }
 fendants. }

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of twelve (12) persons was regularly empaneled and sworn to try said action. Witnesses on the part of plaintiff and defendants were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called, answered to their names, and say they find a verdict for the plaintiff as follows, to wit:

9 We, the jury in the above-entitled case, find a verdict for the plaintiff for the sum of \$7,462.33, seven thousand four hundred and sixty-two dollars and thirty-three cents.

J. FRANCE, *Foreman.*

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said plaintiff have and recover from said defendants the sum of seven thousand four hundred and sixty-two 33-100 dollars, with interest thereon at the rate of ten per cent. per annum from the date thereof till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of forty-nine 50-100 (49) dollars. Judgment rendered October 25, A. D. 1877.

(Endorsed :) Filed Oct. 25th, 1877. C. S. Hill, clerk, by H. G. McMillan, deputy clerk.

Notice of intention to move for new trial.

And now comes the defendants and give notice of their intention to move the court to set aside the verdict herein and grant a new trial to the defendants on the following grounds:

1st. That the evidence is insufficient to justify the verdict in these respects:

There is no proof of the indebtedness of Gordon & Co. to plaintiff.

There is no proof of an account stated between plaintiff and Gordon & Co.

There is no proof that plaintiff gave defendants notice of their acceptance of an intention to act on the guaranty or of an acceptance of the guaranty.

There is no proof that after account with Gordon & Co. closed, defendants, within a reasonable time, or at all, notified defendants of the same, or of the amount of the balance, or demanded payment.

10 2d. The damages are excessive in these respects: The verdict includes amounts not overdrafts of Gordon & Co.; the verdict includes interest compounded at two per cent. per month and more than legal interest.

The verdict includes interest at two per cent. per month, compounded, from April 27th, the day when the last check was honored and account closed, to July 31st, 1875, being more than legal interest and interest on the interest at that rate from July 31st to the date of the verdict.

3d. For errors in law occurring at the trial and duly excepted to:

For error in refusing a non-suit, and duly excepted to.

For errors in admitting and excluding testimony, and duly excepted to.

For error in giving and refusing instructions, and duly excepted to.

4th. That the verdict is against the evidence and contrary to law.

Dated Dec. 10th, 1877.

BENNETT & HARKNESS,

Attorneys for Defendants.

(Endorsed:) Filed Dec. 10th, 1877. C. S. Hill, clerk.

[Wells, Fargo & Co.'s Bank, Exchange, Banking, and Express Company.]

SALT LAKE CITY, May 26, 1876.

Mr. ERWIN DAVIS,

Salt Lake City:

DEAR SIR: We enclose statement of account of Messrs. Gordon & Co.; said account was guaranteed by J. N. H. Patrick and yourself. We desire its immediate settlement and would be pleased to have call and adjust the matter to-morrow.

(Signed)

J. E. DOOLEY, *Agent.*

A copy Exhibit A.

11

EXHIBIT B.

For and in consideration of one dollar to us in hand paid by Wells, Fargo Co. (the receipt of which is hereby acknowledged), we hereby guarantee unto them, the said Wells, Fargo & Co., unconditionally at all times, any indebtedness of Gordon & Co., a firm now doing business at Salt Lake City, Territory of Utah, to the extent of and not exceeding the sum of ten thousand dollars (\$10,000), for any overdrafts now made or that may hereafter be made at the bank of said Wells, Fargo and Company.

This guarantee to be an open one and continuous one at all times, to the amount of ten thousand dollars, until revoked by us in writing.

Dated Salt Lake City, 11th Nov., 1874.

In witness whereof we have hereunto set our hands and seals the day and year above written.

ERWIN DAVIS, [SEAL.]
J. N. H. PATRICK. [SEAL.]

Witness:

JO. GORDON.

12 District court third judicial district, Territory of Utah, county of Salt Lake.

WELLS, FARGO & CO., PLAINTIFF,
vs.
 ERWIN DAVIS AND J. N. H. PATRICK, DEFEND-
 ants.

This cause came on for trial at the September term of said court, to wit, on the 24th day of October, 1877, and was tried before the court and a jury duly empaneled and sworn.

The plaintiff, to maintain the issues on its part, had sworn as a witness HENRY WADSWORTH, who testified: I know Wells, Fargo & Co., and am their treasurer in San Francisco. Since 1853 I have been with Wells Fargo & Co. in banking some ten years, and part of the time banking for myself. I had charge of plaintiff's bank here from October 1, 1873, to the middle of May, 1876. Plaintiff has dealings with other banks and with individuals to a large amount. Its banks have a

13 capital of 2,000,000, and deposits 5,000,000 dollars, and correspondence all over the United States. Plaintiff had dealings with Gordon & Co. in Salt Lake City, Utah, from 1873 to 1875. (Guaranty, a copy of which is set out in complaint, shown witness.) The body of the guaranty is in my handwriting, and the guaranty has been in possession of the plaintiff from its date till now. It was delivered to me, as the representative of plaintiff, by Gordon, for Gordon & Co. At that date Gordon & Co. were overdrawn at plaintiff's bank.

Q. At Salt Lake City, in Utah, in 1874, and prior and subsequent thereto, and among bankers and banks doing business in Utah, and prior thereto in the Pacific coast States—for many years prior hereto—and in the course of dealing with the customers in such banks, do you know the meaning of the word overdraft?

(Objected to by defendants' counsel because the meaning of the word overdraft is a question of law and not of fact, and the question irrelevant. The objection was overruled by the court, to which ruling the defendants, by their counsel, duly excepted, and the exception was allowed.)

A. I do know the meaning of the word among them.

Q. What was it in its ordinary and generally accepted meaning in business among banks and bankers in Utah and on the Pacific coast, and also at the bank of Wells, Fargo & Co., in Utah, in 1874-1875?

(Objected to by defendants' counsel as last above and also for the reason that notice was not brought to defendants of any other than the ordinary meaning. Objection overruled by the court, and to the ruling defendants, by their counsel, duly excepted and the exception was allowed.)

A. An overdraft is a term used to express the condition of an overdrawn account in bank; if a man's account shows a balance against him of \$1,000, we say it is a overdraft. It is a statement of his account in bank.

Q. Is it confined to drafts and checks or does it include other matters, and, if other matters, what?

(Same objection as above—also that it calls for the opinion of the witness and not for a fact. Same ruling by the court and exception by defendants' counsel.)

14 A. It includes all amounts charged in the account, such as in-

terest. It is customary in every bank in the West to charge up interest monthly without a check.

Q. What was amount of the overdraft of Gordon & Co. at the date of the guaranty.

(Objected to by defendants' counsel on the ground that the drafts and checks are the best evidence and until they are accounted for, secondary evidence is not admissible.)

Q. From your best recollection, what was the state of the account at the date mentioned?

(Objected to because absence of drafts and the books of Wells, Fargo & Co. Thereupon the plaintiff tenders the books of Wells, Fargo & Co. Objection overruled by the court, to which ruling defendants' counsel excepted and the exception was allowed.)

A. I can refresh my memory from the books. By the books, at the close of business, Nov. 11th, 1874, the overdraft was \$9,015.06. Gordon & Co. continued to do business at plaintiff's bank till 1875, and the account was always overdrawn after Nov. 11, 1874. The largest overdrafts between the dates mentioned was the last of Nov., 1874, \$11,168.26. On the 31st of July, 1875, the amount of over draft of Gordon & Co. was \$6,200.90. Gordon & Co. was Jo. Gordon.

Q. Was Gordon & Co's account stated to him in 1875? And, if so, when?

(Objected to by defendants' counsel on the ground that overdrafts must be proved and a settlement between plaintiff and Gordon & Co. will not bind the defendants. The objection was overruled; to which ruling defendants' counsel duly excepted and the exception was allowed.)

A. It was stated to him frequently, and the amounts shown on the books. About the last of July, 1875, the amount of \$6,200 was shown to him and he made no objection to it. He frequently promised to pay it. No portion of the account had been paid, but the sum of \$126.40 paid February 9th, 1876. I spoke of the guaranty afterwards to Patrick

15 while he was in the Flagstaff office, in Hussey's bank building before it burned. I called his attention to the amount of overdraft and spoke of the guaranty. He said he signed the guaranty at the request of Mr. Davis, and made no objection to the overdraft. Cross-examined by defendants' counsel. I think Mr. Davis was then in the city, but I had no conversation with him, and only this one conversation with Patrick. The conversation with Patrick was prior to January, 1876, and some four or five months after the account closed at the bank. I spoke of the account and overdraft, and I remember distinctly his answer. I wanted the account paid. I refused to honor Gordon's checks about the middle of April, 1875. I had no negotiation with Davis and Patrick personally at the time Gordon & Co. gave the guaranty. Gordon said he might want \$10,000. I might say I agreed to permit it but for no length of time and it did run over that. At the time the account was stopped he was only overdrawn \$6,200.90. The object of the guaranty was to protect overdrafts. I know no other definition of overdraft than as I have given. It is generally understood as an overdrawn account—always spoken of as the balance against the party on the books—anything that overdraw the account. This was the continuous custom in Wells, Fargo & Co's banks. In statements of accounts to managers of banks, bankers always make statements and if the account is overdrawn call it overdraft. It is the custom of every bank to make interest charges at the end of every month. Interest is an overdraft. The moment the account is stated the interest becomes a

part of it and is an overdraft. I think I know the definition I give of overdraft is the customary one.

Q. Refer to the books again—to the book containing the daily transactions between you—that is the account of April 1st?

A. That is the account of Gordon & Murray on the 1st day of April.

Q. In the account which makes the result of \$6,200, was not the account of Gordon & Murray embraced in the items which make up that result?

(Objected to for the reason that the witness is asked to state
16 from the book whether the account of Gordon & Murray did not form part of this overdraft; that the books shows that long prior to the guaranty there was an account kept in the name of Gordon & Murray, and that thereafter Gordon & Co., their successors, carried on the business and the account of Gordon & Murray transferred to the account of Gordon & Co. prior to the giving of the guaranty; the transfer being made April 1st, 1874, and the guaranty given in November, 1874, and each month thereafter, according to these books, this overdraft was balanced, showing that item of the account approved by Mr. Gordon, of Gordon & Co., and constituting part of the overdraft, and that the item to which the question refers was six months prior to the guaranty, and did at that time constitute part of the overdraft. Also, that the question is immaterial and irrelevant.

(Defendants' counsel states: We propose to prove by this witness that this charge of the indebtedness of Gordon & Murray—a different firm from Gordon & Co.—amounted to \$9,818.10, and was transferred to the account of Gordon & Co. on the 1st of April, without any bill or or check or overdraft for it, and that the amount enters into and constitutes the balance for which suit is brought. Objection sustained by the court, and to the ruling the defendants' counsel duly excepted and the exception was allowed.)

Defendants' counsel then stated: We offer to show by this witness what items of interest are embraced in this account and that interest is compounded at two per cent. per month. Objected to by plaintiff's counsel; objection sustained by the court, and to the ruling the defendants' counsel duly excepted and the exception was allowed.)

Q. In these items of account in this book which make up the balance sued for, was not the interest on the monthly balances charged up at two per cent. per month, and does not the balance sued for include interest at two per cent. per month, compounded monthly from the inception to the close of the account.

(Objected to on the ground that the complaint states, and it is proved, that the account was stated to Gordon & Co., July 31st, 1875;
17 also that the question is immaterial and irrelevant. Objection sustained, and to the ruling the defendants' counsel duly excepted and the exception was allowed.)

(Defendants offer to prove by the witness that the interest thus compounded amounts to over a thousand dollars. Same objection, ruling, and exception as last stated.)

WM. S. MCCORNICK, a witness sworn for plaintiff, testified: I have been engaged in the banking business in this city between four and five years, and am familiar with the usages and customs of bankers and business men doing business with bankers in Salt Lake City and Utah.

Q. Do you know what among banks and bankers and banking men is

the ordinary acceptance and meaning of the word overdraft, as referable to a man's account?

(Objected to on the ground that the law fixes the definition, and it cannot be given by a witness. Objection overruled. Defendants' counsel excepted to the ruling, and the exception was allowed.)

A. It means overdrawn. To draw more against an account than the deposit would be an overdraft in the general acceptance of the term. The balance at the end of the month would be an overdraft. A balance of interest on daily balances goes to make up the overdraft. The custom among bankers is, we make up the statement; we figure up the amount of interest and we charge it up in the account; we enter the interest statement in the account the 1st of every month, return the vouchers, and balance up the customer's book. If there are any charges for which a check has not been drawn we put in vouchers, and, of course, they are examined by customers to see whether they are right.

LEWIS S. HILLS, a witness sworn for plaintiff, testified: I am cashier of the Deseret National Bank and have been engaged in banking in Salt Lake City for eight years, and I think I am acquainted with
18 the customs and usages of banks in Salt Lake City, as to their terms and expressions and mode of doing business.

Q. What is the common acceptance and meaning of the term overdraft as applied to a man's account in bank, among the banks here in Salt Lake City and in your bank?

(Objected to on the ground that the law defines the term, and it cannot be proved by parol. Objection overruled; the defendants' counsel excepted to the ruling and the exception was allowed.)

A. We define an overdraft to be a man's account that is the wrong side of the ledger, that he owes the bank instead of the bank owing him; an overdrawn account we call an overdraft. It would include everything that is charged up against a man whether drawn by him or on our own tags, and includes interest charged up at the end of the month.

J. E. DOOLEY, a witness for plaintiff, sworn, and testified as follows: I am engaged as agent of plaintiff in Salt Lake City, and have had such opportunities as I could gain from conducting their business since about the 15th day of May, 1876, for familiarizing myself with the usage and custom of banks and bankers and their mode of doing business in Salt Lake City. I have been in the banking business since May, 1872, for a time as plaintiff's agent in Ogden, and afterward, before coming here, conducted a bank there for my partner and myself under the firm name of J. E. Dooley & Co.

Q. Do you know what is the ordinary meaning given and ascribed to the word overdraft as applied to a man's account?

(Objected to on the ground that the law defines the term and it cannot be explained by witnesses, and knowledge of any other than the legal meaning has never been brought home to the defendants. Objection overruled; defendants' counsel excepted to the ruling and the exception was allowed.)

A. It would be the daily debit of a party having an account
19 with the bank, the amount that he was owing the bank each day at the close of business. A charge of interest if authorized by him either before or after the overdraft by him on rendition of the account among bankers and banking men would be considered part of the overdraft. I made a demand of Mr. Patrick for the amount of the over-

draft of Gordon & Co., as shown by plaintiff's books, in May, 1876. I think the amount I demanded was \$6,200.90, less a payment of \$176.25. It was on either the 24th, 25th, or 26th day of May, 1876, Mr. Patrick said he would write to Gordon about it. I reminded him of the guaranty and gave that as a reason for presenting the statement of the account to him. I think he said Mr. Gordon was in San Francisco. I don't know that I saw Mr. Davis. I went with Mr. Eoff to their office, and if Mr. Davis was in the room I was not acquainted with him. Mr. Davis' place of business in Salt Lake City was at the Flagstaff office. I mailed a copy of a notice on the 26th, and also sent a copy to the Townsend House. I have a letter-press copy in my letter book; this is a true copy of that; it is written by Mr. Duke and compared by me. I was informed Mr. Erwin Davis was then in town, and his name was published in the list of arrivals, I think, at the Townsend House, and I sent a copy to the Townsend House for him, and the other I put in the post-office at Salt Lake City addressed to him at Salt City, and each included a statement of the account, and I also gave Mr. Patrick a statement of the account at the Flagstaff office.

(Plaintiff offered in evidence the copy of the notice compared by him with the letter-press copy.

Objected to by defendants' counsel on the ground that there is no foundation laid for its introduction, for the reason that it does not appear Mr. Davis was in the city and the post-office is not the proper avenue of communication for a notice; also that it is not shown Mr. Davis received the notice. The objection was overruled by the court; the defendants' counsel excepted to the ruling and the exception was allowed.)

Witness states the notice was deposited in the post-office in a stamped envelope. The notice is annexed, marked Exhibit A, and was read in evidence. Plaintiff offered in evidence and read to the jury original guaranty, a copy of which is set out in the complaint.

ALF. EOFF, sworn for plaintiff: I am 32 years of age; am cashier of plaintiff's bank in Salt Lake City, and I have been in the banking business since 1872. I have had the usual opportunities offered to a clerk in a banking institution and to persons in such positions as I have occupied in a bank for becoming familiar with the usages and customs of banks here and elsewhere. Part of the time since 1872 I have been in the plaintiff's bank at San Francisco and part of the time here. I knew the firm of Gordon & Co., and they had an account with plaintiff in 1874—they had such an account Nov. 11th, 1874, and it has stood on the books to the present time. It was an open running account up to July, 1875. It was stated to Mr. Gordon about the last of July, 1875.

Q. How was it done?

(Objected to by defendants' counsel on the ground that defendants are not bound by a statement of account between plaintiff and Gordon & Co. The objection was overruled; and to the ruling the defendants' counsel excepted and the exception was allowed.)

A. The account was stated to Mr. Gordon, \$6,200.90 being the amount the last day of July, 1875. His book was not made up; I gave him the figures myself over the counter, simply taken from the balance book on a piece of paper and handed to him. He made no objection whatever to it. I talked to him before and after about the account; I had previously given him an account of it; I don't know what dates, but frequently. I spoke to him about it on the 31st of July, 1875, the day the account quit running as an active account, when I handed him

the account over the counter. He never at any time made any objection to this account, nor any promises to me in relation to it. Gordon & Co.'s bank book was not made up to July 31st, 1875, because

21 Mr. Gordon did not bring it into the office. He had it in his possession. I have said to Mr. Gordon, after his account had ceased to be a running account, that we would like to have him bring his bank book in and have his account made up. I think it was May 26th, Mr. Dooley and myself called at Mr. Patrick's office with a statement of the account of Gordon & Co., and the statement at that time was presented to Mr. Patrick and payment of the account demanded. The guaranty was referred to. Mr. Walker was in the office and Mr. Davis, a gentleman I did not know, but Mr. Walker afterward told me it was Mr. Davis. To the demand of payment Mr. Patrick said it was something he would have to refer to Mr. Gordon; that he would take no action in the matter until he had communicated with Mr. Gordon; that, I think, was the substance of it. I afterwards called at the Townsend House to find Mr. Davis. I sent my card to Mr. Davis, and I think he was ill, unwell, in his room, and he declined to see me. I think the report brought back was that he was not feeling well. There was a letter written to Mr. Davis inclosing a statement of this account similar to the one presented to Mr. Patrick; I intended to present it myself, but as I did not see Mr. Davis, I left it enclosed in an envelope to his address, with a copy of the letter we have in our books, at the Townsend House, and I asked the clerk to send it to Mr. Davis' room.

(Objected to, because leaving it with the clerk does not tend to prove notice to Mr. Davis. Objection overruled; the defendants' counsel excepted to the ruling, and the exception was allowed.)

The original of a letter, of which I have here a copy, was dropped in the post-office.

(Objected to on the ground that the post office is not the proper medium to communicate notice between parties in the same town. Objection overruled, and to the ruling defendants' counsel excepted, and the exception was allowed.)

This is a copy of the letter I left at the Townsend House, with the statement of the account, and also a copy of the statement of the account that was put in the post-office on the same day, addressed to

22 Mr. Davis. This is a copy of the letter. I addressed the letter, and my recollection is it was directed to the Townsend House.

It was addressed to him in Salt Lake City. I made inquiries where Mr. Davis would be found as a guide in directing the letter.

Q. Do you know the meaning among bankers in this city and the west of the word overdraft?

(Objection by defendants; overruled, and exception by the defendants.)

A. Yes.

Q. What does the word mean in business transactions at banks and with bankers?

(Same objection, ruling, and exception.)

A. Any amount overdrawn at a man's bank account, where the draft is more than he has money there to pay. Any charge against a man whatever going to make the amount of the overdraft as shown on the books.

Cross-examined:

The word overdraft would include a charge on the books for an outside transaction not arising on bills or checks. When I made the statement of the account to Gordon & Co., I handed him over the counter

just a simple balance, not the list of items. It was a slip of paper on which the balance was contained, and I stated to him that was the balance of the account. I never rendered him the items of that balance. I am familiar with the items which make the balance. This book contains the items of the account up to February, 1875. I kept the items of the account, and at the end of each month delivered to him this book with the vouchers making up the *the* items of the account.

Q. Was not the first item in these terms, "April 1st, balance Gordon & Murray, \$7,744.67," transferred from the account of Gordon & Murray without any check by Gordon & Co.?

A. I do not know anything about it personally. It may have been done by check or otherwise. I see by the books Gordon & Co.'s checks were thrown out in April, 1875; from April the balance seems to run the same, except the interest charged.

23

Redirect:

This book is the deposit book of Wells, Fargo & Co., in account with Gordon & Co. The depositor receives his book, and it is the general way of doing business for him to bring it and have deposits entered, and it usually remains in his hands until he brings it to be balanced to show how his account stands. The last time this book seems to have been balanced was February 28th, 1875, and I suppose from that time remained in Mr. Gordon's possession. Mr. Gordon never brought it back and demanded that it should be balanced up the same as ours. I have in my possession the checks of Mr. Gordon from the time this book was balanced to the present time; all checks entered on the books have been surrendered.

Recross-examined:

When I went to Mr. Patrick's office I believe the statement was the balance of \$6,000, or whatever it was. The last charges on the ledger of a check seems to be for one of \$30, April 27th, 1875. I should say these other items are interest charged at the rate of two per cent. per month. It must have been a few days before or a few days after the 31st day of July that I handed the balance to Mr. Gordon over the counter. I looked at the balance-book when he asked me how it was standing, and figured the interest, added it, and gave him the result up to the 31st day of July. He knew I had charged the interest.

Plaintiff here rested.

Defendant moved the court for a nonsuit on the following grounds:

1st. It has not been shown the plaintiff ever gave the defendants, or either of them, any notice of the acceptance of the guaranty or of the intention of the plaintiff to act on it.

2d. It has not been shown any demand of payment has ever been made on Gordon & Co., or that any notice of such demand and refusal has at any time been served on the defendants.

3d. Because it does not appear in proof that after the last advancement made to Gordon & Co. by Wells, Fargo & Co., and after the stated account was had between them on the 31st of July, 1875, that any notice was given to the defendants of the amount due from Gordon & Co. on overdrafts until the day before the service of the summons in this case, to wit, the 26th day of May, 1876.

Motion overruled; to the ruling the defendant excepted, and the exception was allowed.

The defendants then read in evidence the deposition of Jo. GORDON, who testified: My name is Jo. Gordon; I am at present residing tem-

porarily in the city of San Francisco, State of California; in November, 1874, and up to August, 1875, I resided in Salt Lake City, Utah, and was conducting a commission and forwarding business under the name and style of Gordon & Co., and had been conducting the same from about the 15th of March, 1874, said firm being the successor of the firm of Gordon & Murray, which had been engaged in like business for several years. Under the firm name of Gordon & Co. I kept a bank account with plaintiff during the whole time of the existence of the said firm of Gordon & Co. at the said city of Salt Lake. On or about the 11th day of November, the defendants, Erwin Davis an' J. N. H. Patrick, executed and delivered to me their written guaranty in favor of Wells, Fargo & Co., by which they agreed to indemnify them against overdrafts by Gordon & Co. on Wells, Fargo & Co. up to the sum of ten thousand dollars. This guaranty to be used by me in the dealings and transactions of Gordon & Co. with plaintiff as bankers. The defendants delivered to me but one guaranty. On the 11th day of November, or the day thereafter, I delivered the said written guaranty to Henry Wadsworth, who was then acting as the general managing agent of the plaintiff at Salt Lake City. Prior to my asking Davis to sign this guaranty I had an interview with Mr. Wadsworth, and told him I thought Davis and Patrick would sign a guaranty for me; that I wanted at least a ten thousand overdraft in my business. He agreed to give Gordon & Co. credit to the extent of \$10,000 on the faith of a guaranty to be drafted by himself. He said he ~~he~~ would write out such a guaranty as Wells, Fargo & Co. would accept. This he did in my presence, and gave it to me, and if I recollect correctly the same paper was signed by defendants. Neither of the defendants was present when I delivered the guaranty to the plaintiff. The plaintiff did not keep the agreement with Gordon & Co., because shortly after the guaranty was accepted and before my overdrafts had amounted to the sum of ten thousand dollars I was requested by plaintiff to reduce the amount of my overdrafts as much as possible; this I did until the overdraft did not exceed about \$6,000, at which time, without any notice to me, plaintiff threw out my checks drawn on the bank. The throwing out of my checks crippled me in my business and was one of the causes of my failure.

Here plaintiff objects to the next sentence of the deposition being read, which gives Gordon's understanding of the guaranty, but the objection was overruled and and plaintiff excepted.

My understanding of the terms of the guaranty and the object of both plaintiff and myself was, that I was to have an absolute, unquestioned credit up to the sum of ten thousand dollars for overdrafts. Prior to the execution of this guaranty I had been receiving from plaintiff, on my own individual credit, the privilege of overdrawing sums varying from five to eight thousand dollars, and I stated to Wadsworth, in my interview with him, that I desired an additional credit. I do not recollect any account stated was had between plaintiff and myself on or about the 31st day of July, 1875, unless my bank book was such stated account. I have not my bank book in my possession; it must be among my papers at Salt Lake. My best recollection is the total debit was about \$6,000. The final settlement, after the delivery of the guaranty, ended the day Mr. Wadsworth threw out my bank checks, if that can be called a settlement. There were other items in the account as charged against Gordon & Co. besides overdrafts as drawn by said firm on plaintiff.

The defendants here offered to read the following portion of his answer to the tenth interrogatory :

26 "For example, when I purchased the business of Gordon & Murray, about March 15th, 1874, the overdrafts of that firm, some \$7,700 were transferred to Gordon & Co.'s account. This transfer was not effected by any check or order or overdraft of Gordon & Co., but was done by Wells, Fargo & Co., upon being informed by me that I had purchased the interest of Murray."

Plaintiff's counsel objected, the objection was sustained by the court, and to the ruling the defendants' counsel excepted and the exception was allowed.

On the 1st of April, 1874, I was notified of their action in the premises by the entry of a charge of \$7,740.67 against Gordon & Co. in its bank book, with a memorandum check enclosed therein to a like effect. Also, in all said accounts I was charged from time to time with interest on overdrafts; it therefore embraced items of interest carried on and compounded from month to month. I do not think of anything else material in the matter of this suit.

J. R. WALKER, sworn for defendants, testified: I am a merchant and banker. Have been in the banking business in Salt Lake City perhaps six years. I know the ordinary signification of the word overdraft as used among bankers and business men in the community. When a man's account is overdrawn that is his overdraft—it means his account is overdrawn. Overdrafts are drafts drawn for more funds than the depositor has in the bank. I don't know of any other expression than the simple one overdraft.

Cross-examined.

If a man draws from a bank a bank book worth \$2 and does not give a check but it is charged to his account and a tag put in against it, it would be considered part of the overdraft on his bank account; and interest at the end of the month charged up becomes a part of the overdraft.

BENJ. G. RAYBOULD, sworn for defendant, says: I have been cashier of Walker Brothers' Bank for six or seven years. I understand
27 by overdraft that it is a man's overdrawn bank account, made up by one or more checks or drafts, as the case may be. He draws for more funds than he has to his credit. A balance of interest against a party charged up at the end of the month would be part of his overdraft.

HENRY WADSWORTH, recalled for defendants. Defendants' counsel offered in evidence the bank book of Gordon & Co., identified by Mr. Eoff, and to show by the witness that an item as follows, "April 1st, balance G. & M., 1874, \$7,740.67," was transferred to the account of Gordon & Co. from the account of Gordon & Murray without any check.

Plaintiff's counsel objected for the reasons that the suit is on, and the proof of an account stated, and the items of it are not admissible; also that balances were rendered to Gordon & Co. monthly thereafter and not objected to by him, and no one else can object to it, and the evidence is immaterial and irrelevant. Objection sustained—the defendants' counsel excepted to the ruling and the exception was allowed.

Defendants' counsel then offered in evidence the bank book of Gordon & Co., also a paper tag or memorandum check made by the bank relating to transfer of the \$7,740.67, and makes the same offer of testi-

mony by witness as last above. The said paper is annexed, marked Exhibit 1.

EXHIBIT 1.

SALT LAKE CITY, *Utah*, April 1, 1874.

Wells, Fargo & Company, Salt Lake City, pay to or bearer—
seventy-seven hundred and forty 67-100 dollars, \$7,740.67, account Gordon & Co.

Transferred from Gordon & Murray.

(Same objection, ruling, and exception.)

Defendants then read in evidence the deposition of the defendant, ERWIN DAVIS, of the city of New York.

My name is Erwin Davis, and I am one of the defendants in this action. After signing the written guaranty mentioned, I delivered it to Jo. Gordon. Mr. Gordon informed me that they required more capital to do their business and that Wells, Fargo & Co. would give them a credit of ten thousand dollars if I and Mr. Patrick would guaranty to them their overdraft to that amount, and, desiring to befriend them, we signed the guaranty.

Q. State what, if any, consideration you received for executing the guaranty, and from whom, if any.

(Objected to by plaintiff's counsel as immaterial and irrelevant and inadmissible under the pleadings. Objection sustained by the court; the defendants' counsel excepted, and the exception was allowed.)

Q. Was any notice ever given you by Wells, Fargo & Co. of their acceptance of said guaranty and intention to act on it? And, if so, state when such notice was given.

(Objected to by plaintiff's counsel as immaterial and irrelevant and inadmissible under the pleadings. Objection sustained by the court; to the ruling defendants' counsel excepted, and the exception was allowed.)

Wells, Fargo & Co. never notified me that they had paid overdrafts on the guaranty. Never until a day or two before the commencement of this action did Wells, Fargo & Co. notify or inform me of the state of Gordon & Co.'s account with them or claim that Gordon & Co. owed it a balance for which I was liable under said guaranty. I have nothing further to say.

J. N. H. PATRICK, sworn for defendants, says: I am one of the defendants. When I executed the guaranty I was not aware of the fact that the word overdrafts had any other than its general acceptation or meaning, as contained in vocabularies and law books.

Q. At the time you executed that guaranty, did you contemplate, and was it your intention to guaranty any account or balance due plaintiff from Gordon & Murray, or did you know anything about the account being transferred to Gordon & Co.?

(Objected to by plaintiff's counsel as immaterial and irrelevant and because the contract must show what he intended. Objection sustained and to the ruling defendants' counsel excepted and the exception was allowed.)

The only notice I recollect having from Wells, Fargo & Co. about this guaranty was about the latter part of May, 1876—my recollection is it was about the 29th. Mr. Dooley and Mr. Eoff came to my office

and presented me a balance said to be due by Gordon & Co., of some \$6,000 and demanded payment of it. I told them it was the first I had heard of the matter; that I knew nothing about it and would have to write to Mr. Gordon. They said they claimed it on a guaranty I had signed. That is the only notice I have ever received from the company in any way.

Cross-examined:

The notice was given to me in the Flagstaff office in this city. I don't recollect of any one being present but Mr. Walker. I am pretty confident Mr. Davis was not there. There may have been other persons present—there were nearly always two or three gentlemen in the office. Defendants rest.

The foregoing is all the testimony given on the trial of said action.

Thereupon the court, at the request of the plaintiff, gave instructions to the jury as follows:

You are instructed that the written guaranty offered in evidence in this case is an unconditional guaranty, by defendants, of any and all overdrafts not exceeding in amount ten thousand dollars, for which said Gordon & Co. were indebted to the plaintiff at the date of the commencement of this suit. If the jury believe from the evidence that said guaranty was, by said defendants or by any one authorized by them to deliver the same actually delivered to plaintiff, and that plaintiff accepted and acted on the same, such delivery, acceptance, and action thereon by plaintiff bind the defendants and render the defendants responsible in the action for all overdrafts upon plaintiff made by Gordon & Co. at the date of and since the date of said delivery of said guaranty, and which were unpaid at the date of the commencement of this suit, not exceeding ten thousand dollars.

To the giving said instruction defendants' counsel excepted and the exception was allowed.

The jury are instructed that the written document under seal, offered in evidence in this case, implies a consideration and constitutes an unconditional guaranty of whatever overdraft, if any, not exceeding ten thousand dollars, which the jury may find from the evidence that Gordon & Co. actually owed the plaintiff at the date of the bringing of this suit, and further, if you believe from the evidence that an account was stated of such overdraft between plaintiff and Jo. Gordon & Co., then the plaintiff is entitled interest on the amount found due at such statement from the date thereof, at the rate of ten per cent. per annum.

To the giving of such instruction the defendants' counsel excepted and the exception was allowed.

At the request of the defendants' counsel the court gave the following instruction:

The term overdraft as used in the contract of guaranty must be taken in its ordinary and legal acceptation; to give to it any other meaning or acceptation, there must be a uniform and general custom of dealing among bankers giving it a special or exceptional meaning, and unless such custom be of long standing, the party to be charged upon any meaning of the term different from the ordinary meaning must have knowledge or notice of the custom establishing such special meaning; knowledge or notice having been brought home to either Patrick or Davis, the plaintiff cannot recover receipt on such indebtedness as has arisen in favor of the plaintiff on overdrafts in their ordinary meaning by Gordon & Co.

No other or further instructions were given by the court.

The defendants' counsel requested the court to further instruct the jury as follows:

First. If the jury believes from the evidence that the guaranty sued upon was delivered by the defendants to Joseph Gordon and not to the plaintiff, but was afterwards delivered to the latter by Joseph Gordon or by Gordon & Co., it became and was the duty of Wells, Fargo & Co. thereupon to notify the defendants of the acceptance of said guaranty and their intention to make advancements on the faith of it, and if they neglected or failed so to do the defendants are not liable on the guaranty, and your verdict must be for the defendants.

The court refused to give the instruction; to such refusal the defendants' counsel accepted and the exception was allowed.

Second. If Wells, Fargo & Co. made any advancements to Gordon & Co. on overdrafts on the faith of said guaranty, it became and was the duty of plaintiff to notify the defendants, within a reasonable time after the last of said advancements of the amount advanced under the guaranty, and if the plaintiff failed or neglected so to do it cannot recover under the guaranty and your verdict must be for the defendant.

The court refused to give the instruction; to such refusal defendants' counsel excepted and the exception was allowed.

Third. What is a reasonable time in which notice should be given is a question of law for the court. Whether notice was given is one of fact for the jury. The court therefore instructs you that, if notice of the advancement made under said guaranty was not given until after the lapse of twelve months or upward from the time the last advancement was made to Gordon & Co., this was not, in contemplation of law, a reasonable notice, and your verdict, if you so find the fact to be, should be for the defendant.

The court refused to give said instruction; to such refusal the defendants' counsel excepted and the exception was allowed.

Fourth. If the jury believe from the evidence that said guaranty was delivered to Wells, Fargo & Co. by Joseph Gordon or Gordon & Co., under an agreement that the latter should have the right of making overdrafts on the plaintiff, which, in connection of past overdrafts, should not exceed the sum of ten thousand dollars, and that plaintiff received said guaranty, agreeing to pay said overdrafts, not exceeding in all the sum mentioned, and afterwards refused to pay overdrafts drawn on them by Gordon & Co. to the amount agreed on, the plaintiff is not entitled to recover and your verdict must be for the defendant.

The court refused to give the instruction; to such refusal the defendants' counsel excepted and the exception was allowed.

Fifth. Before any right of action accrued in favor of plaintiff under said guaranty, it was incumbent on it to demand payment of the principal debtor, Gordon & Co., and on their refusal to pay, to notify the defendants. If the jury, therefore, find that no such demand was made and no notice given to the defendants, the plaintiff cannot recover upon the guaranty.

The court refused to give the instruction; to such refusal the defendants' counsel excepted and the exception was allowed.

Sixth. If the jury believe from the evidence that the items comprising the account of \$6,200.90, sued on in this action, was composed in part of items or charges not overdrafts of Gordon & Co., such items or charges should be rejected by the jury in forming their verdict, the

guaranty of the defendants being for overdrafts only and not upon any other indebtedness contracted by Gordon & Co.

This instruction was refused by the court; to such refusal the defendants' counsel excepted and the exception was allowed.

Seventh. Overdrafts are bills or checks drawn for a greater amount than the person drawing the same has funds to meet in the hands of the person or bank upon whom it is drawn. Under the guaranty in this case the defendants are not liable for any indebtedness of Gordon & Co. to Wells, Fargo & Co., except such as has arisen on overdrafts—that is to say, such indebtedness as has arisen on bills or checks drawn by Gordon & Co. on Wells, Fargo & Co. and paid by the latter. Indrawing a bill or check, the signature of the drawer must be signed to it, and without such signature a bill or check cannot exist. The jury are not, therefore, authorized to take into consideration, in forming their verdict, any transaction between Gordon & Co. and Wells, Fargo & Co. except such bills, checks, or drafts as *as* have been duly signed by Gordon & Co., drawn on Wells, Fargo & Co. and paid.

The court refused to give the instruction; to such refusal defendants' counsel excepted and the exception was allowed.

Eighth. The guaranty executed by defendants is limited and confined to indebtedness on overdrafts drawn by Gordon & Co. on Wells, Fargo & Co., and if the jury find from the evidence that an account was stated between Wells, Fargo & Co. and Gordon & Co. at any time after the guaranty sued on was delivered to the former, the defendants are not liable under said stated account if it embraced or included any item besides overdrafts, and in forming your verdict all other items entering into or composing the indebtedness of Gordon & Co. should be rejected.

The court refused to give the instruction; to such refusal the defendants' counsel excepted and the exception was allowed.

Thereupon the case was submitted to the jury, who on the 25th day of October, 1877, rendered their verdict in favor of the plaintiff and against the defendants for the sum of \$7,462.33, for which sum and cost of suit taxed at \$49.00 judgment was in due form rendered.

Thereupon it was duly stipulated—in writing filed—by the counsel of the respective parties that the defendants should have until the 10th day of December, 1877, to make, file, and serve a proposed statement for motion for new trial, and notice of intention to move for a new trial in said action.

And upon the foregoing statement the said defendants allege and assign errors as follows:

1st. The evidence is insufficient to justify the verdict, in these respects:

34 There is no proof of the indebtedness of Gordon & Co. to plaintiff.

There is no proof of an account stated between plaintiff and Gordon & Co.

There is no proof that plaintiff gave defendants notice of their acceptance of the guaranty or an intention to act on it, or of any acceptance of the guaranty.

There is no proof that, after the account with Gordon & Co. closed, defendants within a reasonable time, or at all, notified defendants of the same, or of the amount of the balance, or demanded payment.

2d. The damages are excessive, in these respects:

The verdict includes amounts not overdrafts of Gordon & Co.

The verdict includes interest compounded at two per cent. per month, and more than legal interest.

The verdict includes interest at two per cent. per month compounded, from April 27th, 1875, the day when the last check was honored and the account closed, to July 31st, 1875, being more than legal interest, and interest on the whole sum, including such compounded interest, from July 31st, 1875, to the date of the verdict.

3d. Errors in law, occurring at the trial and duly excepted to as aforesaid; that is, in admitting and rejecting evidence to the jury, against the objection of the defendants in the several instances shown and set forth in this statement.

In refusing defendants' motion for a non-suit, as set forth in this statement.

In giving and refusing to give instructions to the jury as hereinbefore set forth, and to which rulings defendant excepted.

4th. That the verdict is contrary to law and against the evidence.

Dated Dec. 10th, 1877.

BENNETT & HARKNESS,
Attorneys for Defendants.

The foregoing proposed statement, embracing the original proposed statement and the proposed amendments thereto, accepted by defendants' counsel and incorporated therein, is adopted as a statement in the action, and we certify the same is agreed upon and is correct, and that the same has been so settled and agreed upon within the time specified in stipulations extending the time to make the same.

Dated Dec. 24th, 1877.

MARSHALL & ROYLE,
Attorneys for Plaintiff.
BENNETT & HARKNESS,
Attorneys for Defendants.

Afterwards, and on the 29th day of December, 1877, the agreed statement, on motion for a new trial, was duly filed in said court, and thereupon on the same day the defendants filed in said court their motion for a new trial, as follows:

District court, third judicial district, Territory of Utah, Salt Lake County.

WELLS, FARGO & Co., PLAINTIFF,	}
<i>vs.</i>	
ERWIN DAVIS AND J. N. H. PATRICK, DEFEND- ants.	

The defendants, upon record herein, including the agreed statement on file, now move the court to set aside the verdict in the action and to grant a new trial on the following grounds:

36 1st. The evidence is insufficient to justify the verdict, in these respects:

There is no proof of the indebtedness, or of the items of the alleged indebtedness, of Jo. Gordon & Co. to the plaintiff, nor sufficient evidence of a statement of an account by or between the plaintiff and said Gordon & Co. so as to obviate proof of the items of the alleged indebtedness.

There is no proof of an acceptance of the guaranty by the plaintiff, and of any notice to the defendants of an acceptance of the guaranty, or an intention to act on it.

There is no sufficient or any proof that, after the account between plaintiff and Gordon & Co. closed, plaintiff within a reasonable time, or at any time before suit, notified defendants of the same, or of the amount of the overdrafts, or demanded payment.

2d. The damages are excessive, in these respects:

The verdict includes amounts not overdrafts of Gordon & Co.

The verdict includes interest compounded at two per cent. per month, and more than legal interest.

The verdict includes interest at two per cent. per month compounded, from April 27th, 1875, the day when the last check was honored and the account closed, to July 31st, 1875, being more than legal interest, and interest on the whole sum, including such compounded interest, from July 31st, 1875, to the date of the verdict.

3d. Errors in law, occurring at the trial and duly excepted to; that is, in admitting to and excluding from the jury evidence objected to and exceptions to the rulings taken in the several instances shown and set forth in this statement.

In refusing defendants' motion for a non-suit, as set forth in this statement.

In giving to the jury the two instructions given at the request of the plaintiff, and to the giving of each of which the defendants excepted, as shown by the statement.

In refusing each of the eight several instructions asked by defendants, numbered from "first" to "eighth," inclusive, as set forth in the statement.

37 4th. That the verdict is contrary to law and against the evidence.

Dated Dec. 28th, 1877.

BENNETT & HARKNESS,
Attorneys for Defendants.

On the 2d day of January, 1878, an order of court was made and duly filed, which (omitting the title) is as follows:

The motion for a new trial herein having heretofore been submitted to the court by the attorneys of the respective parties without argument, and the court having duly examined and considered the statement on motion for a new trial, as well as the errors alleged, and the court being of the opinion that no error appears as charged, the motion for a new trial herein is overruled, to which the defendants duly except.

January 2d, 1878.

M. SCHAEFFER, *Judge.*

And now come the defendants, and upon the foregoing proposed statement for an appeal, and the record herein, assign and allege the following errors:

1st. The evidence is insufficient to justify the verdict in these respects:

There is no proof of the indebtedness, or of the items of the alleged indebtedness, of Jo. Gordon & Co. to the plaintiff, nor sufficient evidence of a statement of an account by or between the plaintiff and said Gordon & Co. so as to obviate proof of the items of the alleged indebtedness.

There is no proof of an acceptance of the guaranty by the plaintiff, and of any notice to the defendants of an acceptance of the guaranty, or an intention to act on it.

There is no sufficient, or any, proof that after the account between plaintiff and Gordon & Co. closed, plaintiff within a reasonable time, or at any time before suit, notified defendants of the same, or of the amount of the overdrafts, or demanded payment.

2d. The damages are excessive in these respects:

38 The verdict includes amounts not overdrafts of Gordon & Co.

The verdict includes interest compounded at two per cent. per month—and more than legal interest.

The verdict includes interest at two per cent. per month compounded, from April 27th, 1875, the day when the last check was honored and the account closed, to July 31st, 1875, being more than legal interest, and interest on the whole sum, including such compounded interest, from July 31st, 1875, to the date of the verdict.

3d. Errors in law, occurring at the trial and duly excepted to; that is, in admitting to and excluding from the jury evidence objected to and exceptions to the rulings taken in the several instances shown and set forth in this statement.

In refusing defendants' motion for a non-suit, as set forth in this statement.

In giving to the jury the two instructions given at the request of the plaintiff, and to the giving of each of which the defendants excepted, as shown by the statement.

In refusing each of the eight several instructions asked by defendants, numbered from "first" to "eighth," inclusive, as set forth in the statement.

In ruling, in effect, by the refusal of a non-suit, and by giving and refusing instructions, and by admitting and excluding evidence objected to, that a statement of account between plaintiff and Jo. Gordon binds the sureties so as to preclude inquiry into the indebtedness alleged and the items of such indebtedness.

4th. That the verdict is contrary to law and against the evidence.

5th. The court erred in overruling defendants' motion for a new trial.

Dated Jan. 3d, 1878.

BENNETT & HARKNESS,

Attorneys for Defendants.

We certify that the foregoing statement for an appeal to the
39 supreme court has been and is agreed to and is correct. Said statement embraces the statement used on motion for a new trial, and subsequent proceedings in the court, to and including the order overruling the motion for new trial, and the exception to said order.

Dated Jan. 5th, 1878.

MARSHALL & ROYLE,

Attorneys for Plaintiff.

BENNETT & HARKNESS,

Attorneys for Defendants.

40 And afterwards, at a term of the supreme court of the Territory of Utah, began and held on the 14th day of January, A. D. 1878, at Salt Lake City, proceedings were had in said court and said cause and entered on the records of said court as follows, to wit:

TUESDAY, January 20th, A. D. 1878.

WELLS, FARGO & Co., RESPONDENTS, }
vs. } From 3d dist.
 ERWIN DAVIS ET AL., APPELLANTS. }

This cause coming on regularly for hearing was argued by C. W. Bennett, esq., for appellants, and T. Marshall, esq., for respondent.

WEDNESDAY, January 30th, A. D. 1878.

WELLS, FARGO & Co., RESPONDENT, }
vs. } From 3d dist.
 ERWIN DAVIS ET AL., APPELLANTS. }

This cause was further argued by T. Marshall, esq., for respondent, and C. W. Bennett in reply. Submitted and taken under advisement by the court.

41 MONDAY, February 11th, A. D. 1878.

WELLS, FARGO & Co., RESPONDENTS, }
vs. } From 3d dist.
 ERWIN DAVIS ET AL., APPELLANTS. }

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereupon, it is now here ordered and adjudged that the judgement of the district court therein be and the same is hereby affirmed, with costs.

42 And afterwards, on the 9th day of March, A. D. 1878, was filed in the office of said clerk of said supreme court of Utah Territory the opinion of said court in said cause, of which, and endorsements thereon, the following is a copy, to wit:

43 TERRITORY OF UTAH:

Supreme court. January term, 1878.

WELLS, FARGO & Co., RESPONDENTS, }
vs. }
 ERWIN DAVIS AND J. N. H. PATRICK, APPELL- }
 ants. }

Appeal from the third district court.

The action is founded on the following guarantee:

For, and in consideration of one dollar to us in hand paid by Wells, Fargo & Co. (the receipt of which is hereby acknowledged), we hereby guarantee unto them, the said Wells, Fargo & Co., unconditionally, at all times, any indebtedness of Gordon & Co., a firm now doing business at Salt Lake City, Territory of Utah, to the extent of, and not exceeding, the sum of ten thousand dollars (\$10,000) for any overdrafts now made or that may hereafter be made, at the bank of said Wells, Fargo and Company. This guarantee to be an open one and to con-

tinue one at all times, to the amount of ten thousand dollars, until revoked by us in writing.

Dated Salt Lake City, 11th Nov., 1874.

In witness whereof, we have hereunto set our hands and seals
44 the day and year above written.

ERWIN DAVIS. [SEAL.]
J. N. H. PATRICK. [SEAL.]

Witness.

JO. GORDON.

The guarantee was procured by Gordon & Co. and delivered to the plaintiffs, who immediately acted upon it without notice to the defendants of their intention to do so, or of their acceptance of it. The failure to give this notice is made the basis of the appellants' first objection. So that the first question is, was this notice necessary?

The guarantee was to secure an existing indebtedness, as well as future advances. The authorities are quite uniform in holding that when such is the case no notice is necessary. (2d Parsons on Contracts, p. 14.) The contract was absolute and unconditional, and contains in itself no intimation of a desire for specific notice of acceptance; hence it may be supposed that the guarantors had a reasonable knowledge that this guarantee was accepted and acted upon, unless they were informed to the contrary. (Douglas vs. Howland, 24th Wend., 35; Union Bank

vs. Coster's ex'rs. 3d Comst., 212; Smith vs. Dana, 6th Hill, 543.)
45

The account of Gordon & Co. with the respondents stopped in April, 1875, by their refusal to honor checks drawn upon them. The account as it then stood was exhibited to Gordon & Co. at this and subsequent times, and they promised to pay the same. The attention of one of the guarantors was called to the condition of the account sometime before January, 1876, and of both of them shortly before bringing this suit, in May, 1876.

It is claimed on the part of the appellants that reasonable notice of the failure of the principal debtors should have been given; that the notice which was given was not reasonable, and that it is a question of fact for the jury whether a notice is reasonable or not.

The question whether any notice was given or not is a question of fact for the jury, but whether a notice given was reasonable or not is a question of law for the court. What is a reasonable time, the fact of a notice having been given, being proved, or the facts not being in dispute, seems to be entirely a question of law, and not proper to be

46 submitted to a jury. (Croft vs. Isham, 13 Conn., 28; Howe vs. Nichles, 22d Me., 175; Lowry vs. Adams, 22d Vt., 160.)

We do not think any notice was necessary in this case. By a fair construction of the contract demand and notice was waived.

The parties have solemnly stipulated under their hands and seals that there should be no conditions to this guaranty—that it should at all times until revoked by them in writing. They had it in their power to terminate their liability at any time.

The only conclusion that can be drawn from the instrument is that they knew that it was to remain in force until thus revoked by them. And, moreover, there is no claim on the part of the appellants that they have been in the least damaged from the want of notice. Mr. Parsons, in his work upon contracts, vol. 2, p. 28, in treating upon this subject, says: "The question of reasonable time is a question of law, and the cases are very few which could help us in determining what time would be reasonable. But, from the authorities and the reason of the thing,

47 we deduce these rules: the guarantor is entitled to this notice, but cannot defend himself by the want of it, unless the notice and demand have been so long delayed as to raise a presumption of waiver of payment, or unless he can show that he has lost by the delay opportunities for obtaining securities which a notice or an earlier notice would have given him." There was no such delay in this case as would raise a presumption of waiver of payment.

The next point is to the effect that the stated account between respondents and the principal in the guaranty was not binding upon the appellants, and principally upon the ground that it contained an item of account, transferred to that of Gordon & Co. from another firm. The question arises upon substantially this state of facts. Previous to the giving of the contract of guaranty, the firm of Gordon & Murray had been doing business with the respondents, and were in their debt. On the dissolution of that firm, which was previous to the giving of the guaranty, the firm of Gordon & Co. succeeded to the business, and the balance due the respondents was assumed by them and had been transferred to their account, and was a part of their indebtedness when 48 the guaranty was given. It is claimed that this item cannot be included in the term "overdraft," and is not covered by the guaranty.

This guaranty, like all commercial paper, must be construed with reference to the usages of trade and business. The testimony showing what was understood and accepted by banks and business men by the word "overdraft" was properly admitted, and the meaning thus established is fairly presumed to have been the understanding of the parties.

The account of Gordon & Murray transferred to and standing against Gordon & Co. at the time the contract of guaranty was entered into, was an overdraft, and within the terms of the guaranty. So also was the interest on the overdue account.

While it is true that an account stated between Gordon & Co. and the respondents would not be conclusive upon the appellants, yet in our view of the case the testimony offered and rejected to show that the account stated contained as one item the account of Gordon & Murray was immaterial, for it was an offer to prove what the record discloses 49 was admitted by the respondents. And as we have already seen, the fact that it was so included does not change the legal liability of the appellants. That was a part of the existing indebtedness that they guaranteed.

The verdict is not for an excessive amount and is supported by the evidence.

We can see no error in the instructions given to the jury, or in refusing to give those asked on the part of the appellant. The instructions given are substantially in accordance with the views expressed in this opinion.

The judgment of the court below is affirmed.

PHILIP H. EMERSON,
Asso. Justice.

(Indorsed:) Utah Terry, supreme court, January term, 1878. Wells, Fargo & Co., respondents, vs. Erwin Davis and J. N. H. Patrick, appellants. Opinion of the court.

Filed March 9, A. D. 1878.

E. T. SPRAGUE,
Clerk.

Recorded on pages 123 > 126 inc. of opinions.

E. T. SPRAGUE,
Clerk.

50 And afterwards, on the 1st day of April, A. D. 1878, was filed in said office of the clerk of the supreme court of Utah Territory a writ of error and copy thereof, and also a citation with proof of service thereof, the originals of which said writ and citation follow, to wit:

51 TERRITORY OF UTAH,
Salt Lake County :

On this first day of April, A. D. 1878, personally appeared before me, A. S. Patterson, a notary public in and for said county, Joseph Patterson, to me personally known, and who, being by me duly sworn, makes oath and says that on the said first day of April, A. D. 1878, at the city of Salt Lake, in said county and Territory, he served the within and annexed citation on Wells, Fargo & Company, the defendant in error therein named, by delivering to and leaving with Messrs. Marshall & Royle, att'ys of record for said defendant in error, a true copy thereof at their office in said city, and also by delivering to and leaving with J. E. Dooley a true copy thereof at the bank of Wells, Fargo & Co. in said city, the said Wells, Fargo & Co. being a foreign corporation not organized under the laws of Utah, and the said J. E. Dooley being the acknowledged agent of said corporation in said city of Salt Lake and having the charge and management of its said bank, and so far as deponent knows or is informed the said corporation has no officer thereof in the Territory of Utah.

J. S. PATTERSON.

Subscribed and sworn to before me April 1, 1878.

A. S. PATTERSON,
Notary Public.

52 The United States of America to Wells, Fargo & Company
greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Utah, wherein Erwin Davis and J. N. H. Patrick are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgement rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 22nd day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

SAM. F. MILLER,
Asso. Jus. Sup. Court U. S.

53 (Endorsed :) Supreme Court of the United States. Erwin Davis et al., pl'ffs in error, vs. Wells, Fargo & Co., defendants in error. Citation. A true copy of the within citation served on us April 1, 1878. , att'ys for def't in error. Filed April 1, 1878. E. T. Sprague, clerk sup. court of Utah Ter'y.

54 UNITED STATES OF AMERICA, ss :

The President of the United States to the honorable the judge of the supreme court of the Territory of Utah greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, the judges thereof, between Wells, Fargo and Company, plaintiff, and Erwin Davis and J. N. H. Patrick, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-third day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

D. W. MIDDLETON,

Clerk of the Supreme Court of the United States.

Allowed by—

SAM. F. MILLER.

MARCH 22, 1878.

Filed April 1st, A. D. 1878.

E. T. SPRAGUE, *Clerk.*

55 And also on said first day of April, A. D. 1878, was filed in said clerk's office of the supreme court of Utah Territory, a supersedeas bond in said cause, with due justification of the sureties thereon, of which bond, endorsements thereon, and justification of sureties, the following is a copy, to wit:

56 Know all men by these presents, that we, Alexander H. Baker and Algernon S. Patrick, as sureties, are held and firmly bound unto Wells, Fargo and Company in the full and just sum of fifteen thousand dollars to be paid to the said Wells, Fargo and Company, its certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 13th day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas, lately, at a term of the supreme court of the Territory of Utah, in a suit depending in said court between Wells, Fargo and Company and Erwin Davis and J. N. H. Patrick, judgement was rendered against the said Erwin Davis and J. N. H. Patrick, and the said Erwin Davis and J. N. H. Patrick, having obtained a writ of error therefor, and filed a copy thereof in the clerk's office of the said court, to reverse

57 the judgement in the aforesaid suit, and a citation directed to the said Wells, Fargo and Company citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next:

Now, the condition of the above obligation is such that if the said

Erwin Davis and J. N. H. Patrick shall prosecute the writ of error to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

ALEXANDER H. BAKER.

ALGERNON S. PATRICK.

ERWIN DAVIS,

By J. M. WOOLWORTH,

His Att'y.

J. N. H. PATRICK,

By J. M. WOOLWORTH,

His Att'y.

Approved by—

SAM. F. MILLER.

MARCH 22, 1878.

Filed April 1st, 1878, in my office.

E. T. SPRAGUE,

Clerk Sup. Court.

58

Affidavit of surety.

UNITED STATES OF AMERICA,

District and State of Nebraska, ss:

I, Algernon S. Patrick, of the town of Omaha, county of Douglas, and district and State of Nebraska, depose and say that I am one of the sureties, together with Alexander H. Baker, on the bond of Erwin Davis & J. N. H. Patrick, and that I am worth the sum of eight thousand dollars over and above all exemptions from attachment or execution and after the payment of all just debts and legal liabilities incurred for any cause whatever, either as principal or surety; and that I am the owner of real estate worth said amount subject to execution under the laws of the State of Nebraska.

A. S. PATRICK.

Sworn and subscribed before me this 13th day of March, 1878.

[L. S.]

WATSON B. SMITH,

Clerk of Circuit Court of U. S., District of Nebraska.

59

Affidavit of surety.

UNITED STATES OF AMERICA,

District and State of Nebraska, ss:

I, Alexander H. Baker, of the town of Omaha, county of Douglas, and district and State of Nebraska, depose and say that I am one of the sureties, together with Algernon S. Patrick, on the bond of Erwin Davis and J. N. H. Patrick; and that I am worth the sum of eight thousand dollars over and above all exemptions from attachment or execution and after the payment of all just debts and legal liabilities incurred for any cause whatever, either as principal or surety, and that I am the owner of real estate worth said amount subject to execution under the laws of the State of Nebraska.

ALEXANDER H. BAKER.

Sworn and subscribed before me this 13th day of March, 1878.

[SEAL.]

WATSON B. SMITH,

Clerk of Circuit Court of U. S., District of Nebraska.

60 TERRITORY OF UTAH,
County of Salt Lake, ss :

I, E. T. Sprague, clerk of the supreme court of said Territory of Utah, in obedience to the writ of error hereto attached, herewith return to the Supreme Court of the United States said original writ, the original citation issued thereon, with proof of service thereof, together with the foregoing attached transcript of the record and proceedings and opinion of and in said supreme court of Utah Territory and of supersedeas bond in the cause in said writ mentioned, and I hereby certify that said transcript of the record and proceedings, as well of said supreme court as of the district court of the 3d judicial district of said Territory, and of said opinion and bond, are full, true, correct, and complete copies of the several originals thereof on file or of record in my office.

In testimony whereof I have hereunto set my hand and the seal of said court this 3d day of April, A. D. 1878, at Salt Lake City.

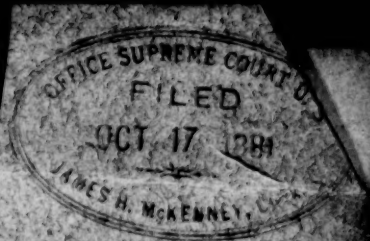
[SEAL.]

E. T. SPRAGUE,

Clerk of Supreme Court of Utah Territory.

(Indorsement on cover :) No. 308. Erwin Davis and J. N. H. Patrick, plaintiffs in error, vs. Wells, Fargo & Company. Utah Terr'y sup. ct. Filed 21st October, 1878.

○



Supreme Court of the United States

No. 308.

ERWIN DAVIS AND J. N. H. PATRICK,

Plaintiffs in Error,

v.

WELLS, FARGO & COMPANY.

BRIEF FOR THE PLAINTIFFS IN ERROR.

J. M. WOOLWORTH,

Of Counsel for Plaintiffs in Error.

John D. Mortimer, Legal Printer, Omaha.



SUPREME COURT OF THE UNITED STATES

No. 308.

ERWIN DAVIS AND J. N. H. PATRICK,
Plaintiffs in Error,

vs.

WELLS, FARGO & COMPANY.

BRIEF FOR THE PLAINTIFFS IN ERROR.

This is a writ of error to the Supreme Court of the Territory of Utah. It was an action brought in one of the District Courts of that Territory upon a guaranty, of which the following is a copy:

“For and in consideration of one dollar, to us paid by Wells, Fargo & Co. (the receipt of which is hereby acknowledged), we hereby guarantee unto them, the said Wells, Fargo & Co., unconditionally at all times, any indebtedness of Gordon & Co., a firm now doing business at Salt Lake City, Territory of Utah, to the extent and not exceeding the sum of ten thousand dollars (\$10,000), for any overdrafts now made or that hereafter may be made at the bank of said Wells, Fargo & Co.

"This guarantee to be an open one, and to continue one at all times, to the amount of ten thousand dollars, until revoked by us in writing.

"Dated Salt Lake City, 11th Nov. 1874.

"In witness whereof we have hereunto set our hands and seals the day and year above written.

ERWIN DAVIS, [SEAL]

Witness: J. N. H. PATRICK, [SEAL]

JO. GORDON.

Wells, Fargo & Co. were bankers at Salt Lake, and Gordon & Co. were customers, and on the 31st of July, 1875, their account was overdrawn \$6200.90. It is alleged in the complaint, that at that time an account was stated by the bank showing this debt, and Gordon & Co. promised to pay it; but, save \$126.40, did not do so—"of all which the defendants had notice."

The defenses are that the plaintiffs gave the defendants no notice of their acceptance of the guaranty, or of any advances or credits under it, or of the closing of the account and the amount then due thereon.

The proof was, that Mr. Wadsworth, who was in charge of the plaintiffs' bank, drew the paper, and gave it to Gordon in order to obtain the signatures of the defendants; that they signed it for his accommo-

dation and gave it to him; and that he delivered it to the plaintiffs. It is not alleged in the complaint that there was any indebtedness of Gordon & Co. to the plaintiffs when the guaranty was delivered to them. The allegation is—

“From and after the delivery to plaintiffs as aforesaid of said instrument in writing, a copy of which is above set out, said Gordon & Co. continued to do business with and make overdrafts upon plaintiffs, at the bank of Wells, Fargo & Co., in the city and county of Salt Lake, Territory of Utah, and that on the 31st day of July, 1875, said Gordon & Co. had made overdrafts upon, and was indebted for overdrafts to plaintiffs at the said bank in the sum of \$6200.90.”

The account was closed in the middle of April, 1875. Mr. Wadsworth testifies that he called Patrick's attention to the guaranty and overdraft some four or five months after the account was closed. Patrick testifies that he had no notice of it until the day before the suit was brought; which was May 27th, 1876. There is no pretense of any earlier notice to Mr. Davis.

There was a trial to a jury, and a verdict and judgment for \$7462.33 damages and \$49.00 costs.

The case was appealed to the Supreme Court, which affirmed the judgment.

ASSIGNMENT OF ERRORS. -

The plaintiffs in error assign the following objections to the said judgment :

1. The court erroneously charged the jury as follows: "You are instructed that the written guaranty offered in evidence in this case is an unconditional guaranty, by defendants, of any and all overdrafts not exceeding in amount ten thousand dollars, for which said Gordon & Co. were indebted to the plaintiffs at the date of the commencement of this suit. If the jury believe from the evidence that said guaranty was, by said defendants or by any one authorized by them to deliver the same, actually delivered to plaintiffs, and that plaintiffs accepted and acted on the same, such delivery, acceptance and action thereon by plaintiffs bind the defendants, and render the defendants responsible in the action for all overdrafts upon plaintiffs made by Gordon & Co. at the date of and since the date of said delivery of said guaranty, and which were unpaid at the date of the commencement of this suit, not exceeding ten thousand dollars;" and refused the request of the plaintiffs in error to instruct the jury as follows:

"First. If the jury believes from the evidence, that the guaranty sued upon was delivered by the defendants to Joseph Gordon and not to the plaintiffs,

but was afterwards delivered to the latter by Joseph Gordon or by Gordon & Co., it became and was the duty of Wells, Fargo & Co. thereupon to notify the defendants of the acceptance of said guaranty, and their intentions to make advancements on the faith of it, and if they neglected or failed so to do, the defendants are not liable on the guaranty, and your verdict must be for the defendants."

2. The court erroneously charged the jury as follows:

"The jury are instructed that the written document under seal, offered in evidence in this case, implies a consideration, and constitutes an unconditional guaranty of whatever overdraft, if any, not exceeding ten thousand dollars, which the jury may find from the evidence, that Gordon & Co. actually owed the plaintiffs, at the date of the bringing of this suit, and further, if you believe from the evidence that an account was stated of such overdraft between plaintiffs and Joseph Gordon & Co., then the plaintiffs are entitled to interest on the amount found due at such statement from the date thereof, at the rate of ten per cent. per annum," and refused the requests of the plaintiffs in error to direct the jury as follows:

"Second. If Wells, Fargo & Co. made any advancements to Gordon & Co. on overdrafts on the

faith of said guaranty, it became and was the duty of plaintiffs to notify the defendants, within a reasonable time after the last of said advancements of the amount advanced under the guaranty, and if the plaintiffs failed or neglected so to do it cannot recover under the guaranty, and your verdict must be for the defendants."

"Fifth. Before any right of action accrued in favor of plaintiffs under said guaranty, it was incumbent on it to demand payment of the principal debtor, Gordon & Co., and on their refusal to pay, to notify the defendants. If the jury, therefore, find that no such demand was made, and no notice given to the defendants, the plaintiffs cannot recover upon the guaranty."

3. The court erroneously refused to direct the jury as requested by the plaintiffs in error, as follows:

"What is a reasonable time in which notice should be given is a question of law for the court. Whether the notice was given is one of fact for the jury. The court, therefore, instruct you that, if notice of the advancement made under said guaranty was not given until after the lapse of twelve months or upward from the time the last advancement was made to Gordon & Co., this was not, in contemplation of law, a reasonable notice, and your verdict, if you so find the fact to be, should be for the defendants."

FIRST POINT.

The charge of the court first assigned for error and its refusal to charge upon the point as requested by the plaintiffs in error, raises the question whether the guaranty becomes operative, if the guarantor be not within a reasonable time informed by the creditor of acceptance. This has been settled by a series of well considered judgments of this court. The first was *Russell v. Clark*, 7 Cr. 69. It was a bill in equity brought by Russell against Clark as surviving partner of Clark & Nightingale, to recover the contents of sundry bills of exchange drawn by Murray & Co., which were endorsed by the plaintiff upon the faith of two letters written to him by that firm, which, it was insisted, guaranteed the solidity and character of the drawers of the bills.

In the course of his opinion, Chief Justice Marshall, after holding that the letters did not contain a guaranty, said at page 92: "Had it been such a contract, it would certainly have been the duty of the plaintiff to have given immediate notice to the defendants of the extent of his engagements.

The next case, *Edmondston v. Drake*, 5 Peters 624, was an action upon a letter written by Edmondston in these words:

"Charleston, 16th April, 1825.

"Messrs. Castillo & Black. Gentlemen: The present is intended as a letter of credit in favor of my regarded friends, Messrs. J. & T. Robson, to the amount of forty or fifty thousand dollars, which sum they may wish to invest through you, in the purchase of your produce. Whatever engagements these gentlemen may enter into will be punctually attended to. With my best wishes for the success of this undertaking, I am, &c. &c.

"C. Edmondston."

The parties to whom the letter was addressed, being unable to undertake the business, introduced Mr. Robson to Drake & Mitchell, with whom large transactions were had, upon the faith of the letter, in the course of which Drake & Mitchell drew bills on London, which were to be met by remittances of the Messrs. Robson.

Of the drawing of the bills on London, Edmondston was not informed; they were dishonored, because of the failure of the remittances of the Messrs. Robson. Thereupon Drake & Mitchell sued Edmondston on the guaranty contained in the letter. Chief Justice Marshall said upon the necessity of notice to Edmondston: "It would, indeed, be an extraordinary departure from that exactness and precision which peculiarly distin-

guish commercial transactions, which is an important principle in the law and usage of merchants. If a merchant should act on the letter of this character, and hold the writer responsible without giving notice to him that he had acted on it. The authorities quoted at the bar, on this point, unquestionably establish this principle."

The next case was *Douglas v. Reynolds, 7 Peters 113*. This was an action brought by Reynolds, Byrne & Co. upon the following letter:

"Port Gibson, December, 1827.

"Messrs. Reynolds, Byrne & Co. Gentlemen: Our friend, Mr. Chester Harding, to assist him in business, may require your aid, from time to time, either by acceptance or by endorsement of his paper, or advances in cash; in order to save you from harm in so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time, for a sum not exceeding eight thousand dollars, should the said Chester Harding fail to do so. Your obedient servants.

"James S. Douglas,

"John G. Singleton,

"Thomas Going."

Upon the faith of this letter, Reynolds, Byrne & Co. were in the habit of endorsing and accepting bills

and making advances to Harding, upon which they, from time to time, received partial payments and consignments of cotton to be sold by them for his account. At length, Harding failed to meet his obligations, and Reynolds, Byrne & Co. sued the drawers of the letter. Mr. Justice Story delivered the opinion of the court, in which after holding that the letter contained a continuing guaranty, he proceeded to consider an instruction to the jury as follows: "That to entitle the plaintiffs to recover on said letter of guarantee, they must prove that notice had been given, in a reasonable time after said letter of guarantee had been accepted by them, to the defendants that the same had been accepted;" and said "the second instruction insists, that to entitle the plaintiffs to recover on the guarantee, they must prove that notice had been given to defendants of that fact in a reasonable time after the guarantee had been accepted. Whether there was not evidence before the jury sufficient to have justified them in drawing the conclusion that there was such notice, we do not inquire. It is sufficient for us to declare that in point of law the instruction asked was correct, and ought to have been given. A party giving a letter of guarantee has a right to know whether it is accepted, and whether the person to whom it is addressed means to give credit on the footing of it or not. It may be most material, not

only as to his responsibility but as to his future rights and proceedings. It may regulate, in a great measure, his course of conduct, and his exercise of vigilance, in regard to the party in whose favor it is given. Especially it is important in a case of a continuing guarantee, since it may guide his judgment in recalling or suspending it."

The same case came before the court again, and is reported in 12 Peters 497.

Mr. Justice McLean delivered the judgment of the court on this occasion, and at page 504, said on this subject: "And first, the court charged the jury that to entitle the plaintiffs to recover on said letter of credit, they must prove that notice had been given, in a reasonable time after said letter of credit had been accepted by them, to the defendants, that the same had been accepted. This instruction, being in conformity to the rule formerly laid down by this court in this case, was properly given. This notice need not be proved to have been given in writing, or in any particular form; but may be inferred by the jury from facts and circumstances which shall warrant such inference."

Lee v. Dick, 10 Peters 482, was an action on a guarantee contained in the following letter:

"Memphis, September 24th, 1832.

"Messrs. N. & J. Dick & Co. Gentlemen: Nightingale & Dexter, of Maury County, Tennessee, wish to draw on you at six or eight months date. You will please accept their draft for \$2000, and I do hereby guaranty the punctual payment of it. Very respectfully your obedient servant,

"Samuel B. Lee."

Mr. Justice Thompson delivering the opinion of the court, and reviewed and affirmed the cases mentioned above.

Adams v. Jones, 12 Peters 207, was upon the following writing:

"Mr. William A. Williams. Sir: On this sheet, you have the list of articles wanted for Miss Betsy Miller's millinery establishment, which you were so very good as to offer to purchase for her. I will be security for the payment, either to you or the merchants in New York, of whom you may purchase, and you may leave this in their hands or otherwise, as may be proper. I hope, to your favor and view, will be added all possible favor by the merchants to the young lady, in quality and price of goods, as I have no doubt she merits as much, by her late knowledge of her business,

industry and pure conduct and principles, as any whatever.

“Calvin Jones.”

Mr. Justice Story delivered the opinion of the court, and said: “And the question, which, under this view, is presented, is whether upon a letter of guaranty addressed to a particular person or to persons generally for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor, that the person giving the credit has accepted or acted upon the guaranty, and given the credit on the faith of it; we are all of the opinion that it is necessary; and this is not now an open question in this court, after the decisions which have been made in *Russell v. Clarke*, 7 *Cranch*. 69; *Edmondston v. Drake*, 5 *Peters’ Rep.* 624; *Douglas v. Reynolds*, 7 *Peters’ Rep.* 113; *Lee v. Dick*, 10 *Peters* 482; and again recognized at the present term in the case of *Reynolds v. Douglas*. It is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability, to exercise due vigilance in guarding himself against losses which might otherwise be unknown to him, and to avail himself of the appropriate means in law and equity to compel the other parties to discharge him from future responsibility. The reason applies with still greater force to cases of a general letter

of guaranty, for it might otherwise be impracticable for the guarantor to know to whom and under what circumstances the guaranty attached, and to what period it might be protracted. Transactions between the other parties, to a great extent, might from time to time exist, in which credits might be given and payments might be made, the existence and due appropriation of which might materially affect his own rights and security. If, therefore, the questions were entirely new, we should not be disposed to hold a different doctrine; and we think the English decisions are in entire conformity to our own."

These decisions have been followed and approved in the state courts: *Lawton v. Maner*, 9 Rich. Luv (So. Car.) 335; *Sollie v. Meugy*, 1 Baily Law (So. Car.) 620; *Claffin v. Briant*, 58 Ga. 414; *Burns v. Semmes*, 4 Cranch. Cir. Ct. 702; *Shewell v. Knox*, 1 Dev. Law (Nor. Car.) 404; *Taylor v. McClung's Ex's*, 2 Houston (Del.) 24; *Tuckerman v. French*, 7 Greenl. (Me.) 115; *Kellogg v. Stockton*, 9 Pa. St. 460; *Bank of Illinois v. Sloo*, 16 La. (Curry) 539; *Menard v. Scudder*, 7 La. An. 385; *Kinchelse v. Holmes*, 7 B. Mon. (Ky.) 5; *Allen v. Pike*, 3 Cush. 238; *Mussey v. Rayner*, 22 Pick. 223; *Rankin v. Childs*, 9 Mo. 665; *Mayfield v. Wheeler*, 37 Texas 256; *McCollow v. Cushing*, 22 Ark. 540; *Howe v. Nichols*, 22

Me. 175; *Geiger v. Clark*, 13 *Cal.* 579; *Cook v. Orne*, 37 *Ill.* 186.

See also *Cremer v. Higginson*, 1 *Mason*; *Wildes v. Savage*, 1 *Story* 22, 323; *Eaton v. Tiffany*, 2 *Har. & G.* 22; *Beekman v. Hall*, 17 *John.* 134.

Nor is there anything to take this case out of the rule.

1. The words found in this guaranty "unconditionally at all times" has not such effect; for the ground of the doctrine is, not that the operation of the writing is conditional upon notice, but it is that until it is accepted and notice of its acceptance given to the guarantor, there is no contract between the guarantor and the guarantee; the reason being that the writing is merely an offer to guaranty the debt of another, and it must be accepted and notice thereof given to the party offering himself as security before the minds meet, and he becomes bound.

Until the notice is given, there is a want of mutuality; the case is not that of an obligation on condition, but of an offer to become bound not accepted; that is, there is not a conditional contract, but no contract whatever.

In *Kellogg v. Stockton*, 4 *Casey* 460, Lewis, C. J., said: "That unless the creditor gave credit on the faith of the guarantee, and the guarantor was notified of its

acceptance there was no agreement." The same is held in *Allen v. Pike*, 3 Cush. 238-242; *Rupely v. Bailey*, 3 Conn. 438; *King v. Allen*, 9 Bar. 320; *New Haven Bank v. Mitchell*, 13 Conn. 206.

2. Nor is the circumstance that the paper expresses a guaranty of past as well as future overdrafts material.

In the first place it does not appear that there was any overdraft when the guaranty was delivered by Gordon to the bank; there is not even an allegation in the complaint that there was at that time any overdraft.

Nor is there proof of such indebtedness when the writing was delivered. It is dated 11th Nov. 1874.

Wadsworth testifies at page 8: "By the books at the close of the business, Nov. 11th, 1874, the overdraft was \$9015.06," but what it was during the day and at the hour in the day when the writing was delivered, he does not pretend to say.

The consideration, therefore, was future advances and not a past debt, which bring the case clearly within the cases cited.

In *Tuckerman v. French*, 7 Greenleaf 115, the guaranty was in terms of a past and future debt. The former was duly paid, and the case was considered as if the future debt alone were provided for.

SECOND POINT.

The neglect to advise the plaintiffs in error of the closing of the accounts and the amount of the overdraft relieved them of their liability. The facts shown in the testimony are these—

Wadsworth says on page 8: "I refused to honor Gordon's checks about the middle of April, 1875.
* * * At the time the account was stopped he was only overdrawn \$6200.90."

Gordon says on page 14: "The final settlement, after the delivery of the guaranty, ended the day Mr. Wadsworth threw out my bank checks, if that can be called a settlement."

This fixes the time when the account closed, as the middle of April, 1875.

Wadsworth says at page 8: "I spoke of the guaranty afterwards to Patrick, while he was in the Flagstaff office in Hussey's bank building, before it burned. I called his attention to the amount of the overdraft, and spoke of the guaranty. He said he signed the guaranty at the request of Mr. Davis, and made no objection to the overdraft."

Cross-examined by defendants' counsel: "I think Mr. Davis was then in the city, but I had no conversation with him, and only this one conversation with

Patrick. The conversation with Patrick was prior to January, 1876, and some four or five months after the account closed at the bank. I spoke of the account and overdraft, and I remember distinctly his answer. I wanted the account paid."

Patrick testifies at page 16: "The only notice I recollect having from Wells, Fargo & Co. about this guaranty was about the latter part of May, 1876. My recollection is that it was about the 29th. Mr. Dooley and Mr. Eoff came to my office and presented me a balance said to be due by Gordon & Co. of some \$6000, and demanded payment of it. I told them that it was the first I had heard of the matter; that I knew nothing of it, and would have to write to Mr. Gordon. They said they claimed it on a guaranty I had signed. That is the only notice I have ever received from the company."

No notice of any kind was ever given to Mr. Davis. If Mr. Wadsworth is correct none was given to Mr. Patrick until five months after the middle of September.

If Mr. Patrick is correct no notice was given to him until May, 1876,—a year and a month after.

Gordon testifies at page 14: "The throwing out of my checks crippled me in my business, and was one of the causes of my failure."

He also says that he resides in San Francisco, and resided in Salt Lake up to August, 1875.

From this testimony it appears that between the time the account was closed, namely, the middle of April, 1875, and the time when notice was given to Patrick, whether that was the middle of September of the same year or May of the following year, Gordon failed and left the country.

In either view of the case the delay was unreasonable.

In *Douglas v. Reynolds*, 7 Peters 126, this court says: "The fourth instruction insists that a demand of payment should have been made of Harding, and, in case of non-payment by him, that notice of such demand and non-payment should have been given in a reasonable time to the defendants; we are of opinion that this instruction ought to have been given. By the very terms of this guarantee, as well as by the general principles of law the guarantors are only collaterally liable upon the failure of the principal debtor to pay the debt. A demand upon him, and a failure on his part to perform his engagements are indispensable to constitute a *casus fœderis*. The creditors are not indeed bound to institute any legal proceedings against the debtor, but they are required to use reasonable diligence to make demand, and to give notice of the non-

payment. The guarantors are not to be held to any length of indulgence of credit which the creditors may choose; but have a right to insist that the risk of their responsibility shall be fixed, and terminated within a reasonable time after the debt has become due."

The Louisville Co. v. Welsh, 10 How. 461-474; *Oxford Bank v. Haynes*, 8 Peck 423; *Cremer v. Higginson*, 1 Mason 323-340; *Howe v. Nichols*, 22 Paine 175.

THIRD POINT.

It was error for the court to withdraw from the jury the question of notice and refuse the third request of the plaintiffs in error. The disagreement between Wadsworth and Patrick as to the time of the notice, the latter swearing that it was not until May 27, 1876; whereas the account was closed in the middle of April, 1875, justified the prayer in the very terms of it.

In *Lawrence v. McCalmont*, 2 How. 426; the guaranty was in these words:

"Messrs McCalmont, Brothers & Co., London. Gents: In consideration of Messrs J. & A. Lawrence having a credit with your house, and in further consideration of one dollar paid me by yourselves, the receipt of which I hereby acknowledge, I engage to you that they shall fulfil the engagements they have

made and shall make with you, for meeting and reimbursing the payments which you may assume under such credit at their request, together with your charges; and I guaranty you from all payments and damages by reason of their default.

You are to consider this a standing and continuing guarantee without the necessity of apprising me, from time to time, of your engagements and advances for their house, and in case of a change of partners in your firm or theirs, the guarantee is to apply and continue to transactions afterwards between the firms as changed, until notified by me to the contrary.

Yours respectfully,

Susan Lawrence."

And Mr. Justice Story delivering the opinion of the court said, at page 453: "As to the sixth point on the question, whether due notice of the failure of Messrs J. & A. Lawrence to repay the advances had been given; it was a mere question of fact for the consideration of the jury as to whether the guarantor had reasonable notice or not. They found a verdict for the plaintiffs, and we are not at liberty to disturb it in a court of error.

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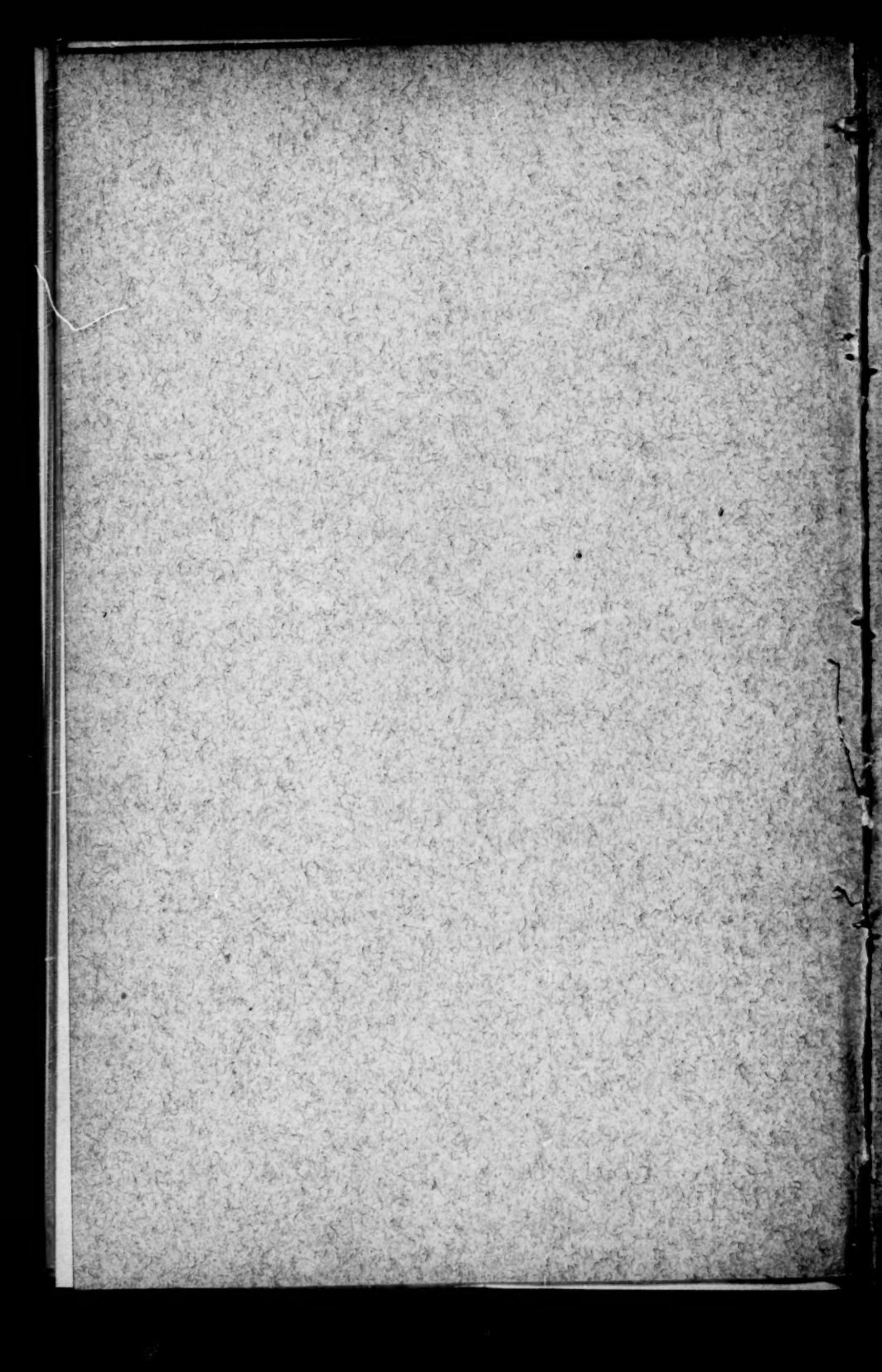
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Supreme Court of the United States

No. 64.

ERWIN DAVIS and J. N. H. PATRICK,
PLAINTIFFS IN ERROR,

vs.

WELLS, FARGO & COMPANY.

In Error to the Supreme Court of the Territory of Utah.

BRIEF FOR THE DEFENDANTS IN ERROR,

By SHELLABARGER & WILSON.

Thomas McQUIE & Co., Law Printers, Washington, D. C.

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BRIEF ON BEHALF OF THE DEFENDANTS IN ERROR.

We shall, in this brief, not go over in detail each separate objection to rulings on the admission of evidence or charge to jury, but shall notice the propositions of law which cover and dispose of each and all of the rulings excepted to.

I.

OVERDRAFT.

The substance of all rulings admitting evidence in regard to the meaning of the word "overdraft" is expressed in the instructions asked by defendant and given by the court, (R., bottom of p. 17,) the effect of which is that the jury must give the word—"overdraft"—its ordinary legal acceptance, except as the jury may find that a uniform,

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I.

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general, and long-continued custom of banks gave the word a special sense, known to defendants.

The questions asked, objected to by defendants, and admitted, all asked for the ordinary signification of the word "overdraft" in Utah and on the Pacific Coast, and did not seek to give it a special or exceptional sense.

The sense of this word in Utah and on the Pacific Coast *generally* was what was asked for. (See the interrogatories to the following witnesses on the following pages: Wardsworth, p. 7; McCormick, pp. 9, 10; Dooley, p. 10; Eoff, p. 12.)

Was it competent to prove what "overdraft" means in Utah and on the Pacific Coast generally among bankers?

The answer to this is that given in *Robinson v. U. S.*, 13 Wall., 365:

"Custom or usage is properly received to ascertain and explain the meaning and intention of parties to a contract, whether written or parol, the meaning of which could not be ascertained without the aid of such extrinsic evidence; and such evidence is thus used on the theory that the parties knew of the existence of the usage or custom, and contracted with reference to it. This latter rule is well settled."

The cases holding that doubtful words in a contract, or words having a special, local, or commercial sense, may be defined by proving what their sense was at the place of contract, are innumerable. (See some of them: 1 Smith's Lead. Cases, (5th Am. ed.), top of p. 677, side pages 306, 307, 308, &c.)

In *Thorington v. Smith*, 8 Wall., 1-12, the court allowed the sense of the word "dollars," at the place of the contract as there understood, to be proved by parol.

In *Robinson v. U. S.*, 13 Wall., 363, the court held that a contract simply to "deliver barley" might be shown to mean, at the place of contract, that the delivery must be in sacks.

In Decatur Bank, 21 Wall., 301, it would seem evidence was resorted to to show what the word "cattle" meant at the place of contract.

But it is needless to further cite authorities on this point, because even the evidence of defendants' witnesses (as Walker and Raybold, R. 15) gives the *same* sense to "overdraft" as that given by the plaintiffs' witnesses. This sense was one which does not contradict or antagonize anything in the written guaranty. It merely gives the commercial signification, at the place of the contract, of one of the words of the guaranty; and there is nothing anywhere in the record even tending to show that the meaning of this word, as given by plaintiffs' witnesses, is not the general and legal sense of the word amongst bankers everywhere. Hence there is nothing to indicate that the ruling on the admission of this evidence worked any prejudice to the defendants, even were it not true that the sense given, by the evidence admitted, is the universal sense of the word "overdraft."

It is perfectly manifest that nothing in this record shows that the rulings of the court regarding the sense of the word "overdraft," as employed in this guaranty, violated the rule of law on this subject as the same is so often repeated in this court, the last example of which is in the case of Bank v. Burkhardt, 100 U. S., 692, where the court says:

"A general usage may be proved in proper cases to remove ambiguities and uncertainties in a contract, or to annex incidents, but cannot destroy, contradict, or modify what is otherwise manifest."

II.

NOTICE UNDER THE GUARANTY.

Another class of questions made by the defendants is stated in the instructions asked by defendants, Nos. 1, 2, 3,

5, (R. 18,) all based upon the claim that there was no liability of defendants on the guaranty set out in the record, (p. 2,) unless the plaintiffs first gave notice of their acceptance of the guaranty, and unless within a reasonable time after each advancement, made on the faith of the guaranty, the plaintiffs gave notice to defendants of the fact of advancement.

The guaranty is in these words:

"For and in consideration of one dollar to us in hand paid by Wells, Fargo & Co., the receipt whereof is hereby acknowledged, we hereby guarantee unto them, the said Wells, Fargo & Co., unconditionally, at all times, any indebtedness of Gordon & Co., a firm now doing business at Salt Lake City, Territory of Utah, to the extent of and not exceeding the sum of ten thousand dollars (\$10,000), for any overdrafts now made or that may be hereafter made at the bank of said Wells, Fargo and Company. This guaranty to be an open one, and to continue one at all times to the amount of ten thousand dollars, until revoked by us in writing.

"Dated Salt Lake City, 11th Nov., 1874.

"In witness whereof, we have hereunto set our hands and seals the day and year above written.

"ERWIN DAVIS. [SEAL.]

"J. N. H. PATRICK. [SEAL.]

"Witness: L. GORDON."

Did the court err in refusing such instructions?

Please note the following elements of this guaranty:

1. It is one under seal, and therefore denoting a consideration paid, (see 24 Wend., 35,) and besides is expressly stated to be made on a consideration paid, and estops the party from denying the consideration. (See also *Laurance v. McCalmont*, 2 How., 426-452.)

2. It is not a "*proposal*" for a guarantee, but is expressly stated to be a *present* guaranty. The words are "*we hereby guarantee*"—in the present tense.

3. It is not a conditional guaranty, binding only on con-

dition of the giving of notice of any sort, but is made in express words to be "*unconditional*."

4. It is not an *indefinite* guaranty in respect to the amount guaranteed, but is exact as to the maximum amount guaranteed—ten thousand dollars.

5. It is a guaranty, in part, of a then existing indebtedness. It is one agreeing *now* to guarantee that present and also future indebtedness in *consideration* of plaintiffs giving further credit.

6. The guaranty is one not only taking effect *in presenti*, and absolutely or "*unconditionally*," but is one which expressly defines what alone shall, as against the guaranty, put an end to its continuing force, to wit, "*until revoked by us in writing*."

7. The express words of the guaranty make its acceptance by plaintiff to take effect and become binding *at the same moment* when the paper is delivered.

One of the qualities, then, of this guaranty, is undeniably and expressly that it is an "*unconditional*" guaranty. Unconditional is in law the exact equivalent of "*absolute*." Bouvier defines "*absolute*" thus: "*complete, perfect, final; without any condition or incumbrance*."

Here, then, we deal with an "*absolute*" or unconditional guaranty; and the question is, Do such require notice of acceptance? Does one who binds himself "*unconditionally*" to pay a named amount bind himself *only on condition* that he gets notice of acceptance? Is not an agreement to pay unconditionally an express waiver of all notices? On principle it seems impossible to discuss such a question.

The authorities hold that such notice, in the case of such a guaranty "*absolute*," is not required.

In *March v. Putney*, 56 N. H., 34, the guaranty expressed a nominal consideration, as in the case at bar; was by its terms to be continuing until countermanded, just as in this case; but was, unlike ours, without limitation as to

amount, and therein was more *favorable* than ours to the requirement of notice. The guaranty was in these words:

"In consideration of one dollar to me paid by Marsh Bros., Price & Co., of Boston, Massachusetts, I do hereby guarantee to them the prompt payment, within four months from the date of purchase, for all goods which the said Marsh Bros., Price & Co. may from time to time sell to my sons, Fred C. Putney and Charles Putney, who are about to open a store, &c.; * * * it being understood that this shall be a continuing guaranty, and remain in full force until countermanded by me in writing."

This differs from the one at bar only in these particulars: (1) The amount guaranteed is not limited; (2) it is not stated to be *unconditional*; and (3) no part of the debt guaranteed existed at the date of the guaranty. The court here held this guaranty an *absolute* one, and that no notice was required. The court's words are: "When the undertaking to pay is *absolute*, notice to the guarantor is unnecessary."

In *Union Bank v. Coster's Ex'trs*, 3 Comst., 212, the court, referring to *Douglass v. Howland*, 24 Wend., 35, and *Smith v. Dann*, 6 Hill, 543, say:

"We must hold the law to be settled in this State that where the guaranty is absolute no notice of acceptance is necessary. Judge Cowen in *Douglass v. Howland*, 24 Wend., 35, and Judge Bronson in *Smith v. Dann*, 6 Hill, 543, examined the cases at length upon this question, and showed conclusively that by the common law no notice of the acceptance of any contract was necessary to make it binding unless it be made a condition of the contract itself, and that contracts of guaranty do not differ in that respect from other contracts. In this case the only condition of Coster's undertaking was that the bank should purchase the drafts to be issued by Kohn, Daron & Co., and upon complying with that condition the rights of the parties became fixed and the contract binding.

"There is nothing in the contract from which we can infer that it was the intention of the parties that notice should be given in order to fix the guarantor. No more is required

to make the guarantor liable than to make Heckscher & Coster, and the only notice to them necessary was the presentment of the drafts for their acceptance within a reasonable time." (*Allen v. Rightmere*, 20 Johns., 365; *Clark v. Burdett*, 2 Hall, 197; *Cro. Jac.*, 287, 685; 2 Salk., 457; *Vin. Ab.*, Notice A, 3; *Com. Dig. Plead.*, C, 75; 2 Chitty, 403.)

The instruments on which the above case arose are in these words:

"NEW YORK, *May* 29, 1841.

SIR: We hereby agree to accept and pay at maturity any drafts on us at sixty days' sight, issued by Messrs. Kohn, Daron & Co., of your city, to the extent of twenty-five thousand dollars, and negotiated through your bank.

We are respectfully, Sir, your obedient servants,

HECKSCHER & COSTER."

At the foot of the letter of credit was a guaranty executed at the same time by John G. Coster, as follows:

"I hereby guarantee the due acceptance and payment of any draft issued in pursuance of the above credit.

JOHN G. COSTER."

The following cases hold, substantially, the same doctrine announced in the foregoing cases, to wit: That an "absolute" present guaranty, as distinguished from an offer to guarantee, is a species of obligation where no notice of acceptance of the guarantee or of the credit furnished thereunder, is required:

Sanders v. Etcherson, 36 Ga., 404.

Matthews v. Christman, 12 Smeedes & Mar., 595.

Case v. Howard, 41 Iowa, 479.

Hooper v. Gooding, 86 Ills., 60.

Bright v. McKnight, 1 Smeed. (Tenn.), 158.

Paige v. Parker, 8 Gray, 211-213.

In this last case the court say: "An *absolute present guar-*

anty, complete in its terms and fixing the liability of the guarantor, takes effect as soon as acted upon."

Caton *v.* Shaw, 2 Harris & Gill. (Md.), 13.

Wordsworth *v.* Allen, 8 Gratton (Va.), 174.

Irvin *v.* Brassfield, 10 Heisk. (Tenn.), 425.

In Powers *v.* Bumcratz, 12 O. S. R., 273, what is unanimously there decided is expressed in these words: "When upon a fair construction of the terms of a written obligation, the party executing the obligation binds himself to be responsible for goods to be sold to a third person, it is to be regarded as an absolute guaranty, and when acted in accordance with its terms the liability of the guarantor attaches, and no notice to him of the acceptance of the guaranty, OR OF ITS HAVING BEEN ACTED ON, is necessary."

In New Haven Bank *v.* Mitchell, 15 Conn., 206, A gave to B a written guaranty for value received, agreeing that he (A) would, at all times, be responsible to B for a limited amount of paper indorsed by C, and held by B, without notice to A by B. This guaranty was simultaneously delivered by A and accepted by B. And on the faith of this guaranty B discounted certain paper indorsed by C: Held, 1st, *That no other acceptance by B, or notice thereof to A, was necessary to perfect the obligation of A*; and 2d, that B was not required to give A any notice of said discounts.

THE GUARANTY'S TERMS MAKE IT BINDING ON DELIVERY.

There is another feature of this guaranty, besides the unconditional character of the obligation, which places it in the class where no notice of its acceptance is required. It is this: It is, by its express words, made to be an agreement *inter partes*, taking effect, by its terms, as against and between *both* parties, at the moment of its delivery or being parted with by the guarantors. The guarantors in it admit and say that the plaintiff below has accepted the guaranty, and *has paid* to the guarantors value for the delivery of their

promise. It is impossible to say, where a promise of guaranty says, as this does, in effect, that the promise is not only accepted, but is *paid for* by the acceptor, that there still remains a duty on the acceptor to give notice of the acceptance, when the terms of the instrument so show that it is accepted at the instant, and by virtue, of the act of delivery. And precisely this is what is held by the authorities.

No one has better stated the principle on which this distinction rests than has Mr. Parsons. (2 Contracts, 12, 6th ed., side p. 12.) He says:

"The contract of guaranty, like every other contract, implies two parties, and requires the agreement of *both* parties to make it valid. In other words, the promise to pay the debt of another is not valid unless it is accepted by the promisee. Language is sometimes used by courts and legists which might seem to mean that there were cases of guaranty which need not be accepted, but this is not accurate. *There are cases in which this acceptance is implied and presumed*; but there must be acceptance or assent, express or *implied*, or there can be no contract. The true questions are, when must this acceptance be *express* and positive, and in what way and at what time must it be made when an express acceptance is necessary. These questions have sometimes been found very difficult. If one goes with a purchaser, and there says to a seller, 'Furnish him with the goods he wishes, and I will guarantee the payment,' and the seller thereupon furnishes the goods, [as defendants in error did the money,] *that* would be a sufficient acceptance of the guaranty and a *sufficient notice* to the guarantor. *All the parts of the transaction would be connected*, and could leave no doubt as to its character."

Then on same page, note "*d*," is the following:

"Notice of the acceptance is not necessary, however, *where the acceptance is contemporaneous with the guaranty.*"

Citing—

Wilds *v.* Savage, 1 Story, 22.

Bleeker *v.* Hyde, 3 McLean, 279.

New Haven Bank *v.* Mitchell, 15 Conn., 20.

In the above case from 1 Story R., 22, a Boston merchant, Bruce, asked one Austin to give him, Bruce, a letter of credit to plaintiff, Wilds, for £2,000, which Austin agreed to give to Wilds, provided the goods bought with the £2,000 should be consigned to plaintiff, and that Bruce should, in addition, and as a further security, furnish a personal guaranty to the amount of £500. The defendant Savage agreed to become such guarantor. And thereupon Austin gave Bruce a letter of credit for £2,000 on behalf of plaintiff Wilds, dated 7th June, 1836, to be drawn for, on account of Bruce, by one Tuckerman, or by Russell & Co., of Canton. Bruce indorsed on Austin's said letter of credit a promise to place the plaintiff Wilds in funds to cover the drafts, with interest, &c., or to settle the same in Boston. And the defendant Savage *indorsed on such letter of credit his promise to the plaintiff that Bruce should punctually fulfill his said engagement to the extent of £500, or, on Bruce's default, to pay that amount on demand to the order of plaintiff Wilds.* The guaranty was delivered, bills drawn, consignments made, &c., as contemplated. Bruce made default and Savage was sued on his said guaranty, and he, amongst other things, set up the defense that he had no notice of the acceptance of his said guaranty, or of Bruce's default.

As to this defense, Story, J., (pages 31, 32,) said: "I admit that upon every guaranty of *future* advances it is the duty of the party making the advances to give notice," &c., citing 7 Cr., 69; 5 Pet., 624; 7 Pet., 113; 10 Pet., 482; 12 Pet., 207, 497.

He then proceeds:

"This doctrine, however, is inapplicable to the circumstances of the present case; for the agreement to accept was contemporaneous with the guaranty, and, indeed, constituted the consideration and basis thereof."

In our case the agreement to give the credit to Gordon

& Co. was contemporaneous with the promise of defendants to guarantee, and was part or basis of such promise to guarantee, and expressed this on the face of the guaranty by agreeing and declaring, in legal effect, that the parties to the guaranty, Wells, Fargo & Co. of the one part and Davis & Patrick of the other part, had met and agreed on the terms of a guaranty; that Wells, Fargo & Co. had *paid*, and Davis & Patrick had *received*, a consideration for the promise of the latter to guarantee for overdrafts by Gordon & Co. *now* made or hereafter made. It is simply impossible to write out an agreement more exactly coming within this language of Judge Story, to wit, one where the agreement to accept, by Wells, Fargo & Co., is "contemporaneous" with the promise of Davis & Patrick, to guarantee, than is this guaranty. And this court has approved this case of *Savage*. (See 10 How., 475.)

III.

NOTICE OF THE CREDITS GIVEN NOT REQUIRED.

Where notice of the acceptance of the guaranty is either proved to have been duly given, or where the terms of the guaranty were such that notice of acceptance is not required, and the guaranty is a continuing one, (as it is here,) there the giving of notice of each successive credit given on the faith of the guaranty is not required; and such notice, when it is not also waived, as it is by the present guaranty, is only required to be given within a reasonable time after the dealings under the guaranty *are closed*; and where *no damage results from the failure to give even this notice*, there is no discharge from liability on account of such want of notice. Such is the holding of the court in *Louisville Manuf. Co. vs. Welch*, 10 How., 461-475. And in *Wilds et al. vs. Savage*, 1 Story R., 32, this doctrine is fully stated. The court says:

"Where a guaranty is accepted and notice has been

duly given to the guarantor," [or where none is required, or the notice is waived, as in the present case.] * * *
 "I am not aware that it has ever been held that it was indispensable in all cases to give another notice of the amount of the advances actually made," &c.

This case in 1 Story R., 32, is cited and approved in Louisville Manuf. Co. *vs.* Welch, 10 How., *supra*.

By this authority two things must concur in order to discharge the guarantor's liability—one, a want of reasonable notice after close of the credit; the other, that the want of such notice resulted in loss. Here there is no pretense that the want of such notice resulted in loss to plaintiff's in error.

We have above given a reference to all the cases decided in this court on the subject of the notice required in cases of guaranty; and it will be found that none of them hold a doctrine at war with that approved in Louisville Manuf. Co. *vs.* Welch, where that case approves Wilds *vs.* Savage, 1 Story R., 32, or anything which conflicts with our proposition, which we again repeat, as follows:

Where a guaranty is absolute or unconditional, and where its terms make it a *present mutual* agreement between parties thereto, executed upon a consideration expressed, there the contract takes effect immediately on delivery according to its terms, and is binding from such delivery according to said terms; and such "unconditional" contract requires no notice, of acceptance, to the guarantor; and no notice of the credits furnished thereunder at the time of furnishing them; and the guarantor is liable, and even when notice of advances is not waived the guarantor is liable, unless he can show that he *was damaged by a failure to give a reasonable notice after the transactions, under the guaranty, were closed.*

What the opinion of the court below declares (R., bottom page 24) is strictly true, to wit, that "there is no claim

on part of appellants that they have been in the least damaged from the want of notice."

Hence there is no error in the record regarding either the want of notice of acceptance or of the credits given.

IV.

THE FAILURE TO GIVE THE AGREED AMOUNT OF CREDIT.

The fourth charge asked by plaintiff in error (R. 18) is, in substance, that if the guaranty was delivered to Wells, Fargo & Co. by Gordon & Co. under an agreement that Gordon & Co. should have the right to make overdrafts not exceeding \$10,000, and Wells, Fargo & Co. received said guaranty agreeing to pay such overdrafts not exceeding \$10,000, and if Wells, Fargo & Co. afterwards refused to honor such overdrafts to said amount, then there was no right of recovery.

The rejection of this request was right for several reasons. One, that it *seems* to invite the jury to go into an inquest, *outside of the written guaranty*, as to what the terms of the guaranty were, which it was incompetent and improper for the jury to do, and besides was not authorized by any testimony in the case. (See 1 How., 169.)

If it did not mean to invite a departure from the written guaranty, then it was confusing and improper in this regard as tending to authorize the jury to find some contract of guaranty distinct from the writing.

If it is to be construed as simply asking the court to instruct the jury that the legal effect of the written guaranty was to bind Wells, Fargo & Co. to give Gordon & Co. \$10,000 of credit provided Gordon & Co. should ask so much, then the instruction asked was not warranted by the terms of the guaranty.

The guaranty does not bind Wells, Fargo & Co. to give credit for any *minimum* amount, but its effect is, as between

duly given to the guarantor," [or where none is required, or the notice is waived, as in the present case,] * * *
 "I am not aware that it has ever been held that it was indispensable in all cases to give another notice of the amount of the advances actually made," &c.

This case in 1 Story R., 32, is cited and approved in Louisville Manuf. Co. *vs.* Welch, 10 How., *supra*.

By this authority two things must concur in order to discharge the guarantor's liability—one, a want of reasonable notice after close of the credit; the other, that the want of such notice resulted in loss. Here there is no pretense that the want of such notice resulted in loss to plaintiffs in error.

We have above given a reference to all the cases decided in this court on the subject of the notice required in cases of guaranty; and it will be found that none of them hold a doctrine at war with that approved in Louisville Manuf. Co. *vs.* Welch, where that case approves Wilds *vs.* Savage, 1 Story R., 32, or anything which conflicts with our proposition, which we again repeat, as follows:

Where a guaranty is absolute or unconditional, and where its terms make it a *present mutual* agreement between parties thereto, executed upon a consideration expressed, there the contract takes effect immediately on delivery according to its terms, and is binding from such delivery according to said terms; and such "unconditional" contract requires no notice, of acceptance, to the guarantor; and no notice of the credits furnished thereunder at the time of furnishing them; and the guarantor is liable, and even when notice of advances is not waived the guarantor is liable, unless he can show that he *was damaged by a failure to give a reasonable notice after the transactions, under the guaranty, were closed.*

What the opinion of the court below declares (R., bottom page 24) is strictly true, to wit, that "there is no claim

on part of appellants that they have been in the least damaged from the want of notice."

Hence there is no error in the record regarding either the want of notice of acceptance or of the credits given.

IV.

THE FAILURE TO GIVE THE AGREED AMOUNT OF CREDIT.

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If it did not mean to invite a departure from the written guaranty, then it was confusing and improper in this regard as tending to authorize the jury to find some contract of guaranty distinct from the writing.

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The guaranty does not bind Wells, Fargo & Co. to give credit for any *minimum* amount, but its effect is, as between

Wells, Fargo & Co. and the guarantors, to bind Wells, Fargo & Co. to give such amount of credit as, in good faith and with due regard to the rights and safety of *both* parties to the guaranty, Wells, Fargo & Co. might decide it proper to give, not exceeding \$10,000, but does not bind them to continue the credit for any specified length of time.

Suppose Gordon & Co. had gone into bankruptcy immediately after the guaranty was accepted by defendants in error, will it be pretended that Wells, Fargo & Co. were obliged, by accepting said guaranty, to loan \$10,000 to Gordon & Co., and then look to guarantors for payment? And yet this instruction here asked would require such a loan under all conditions of Gordon & Co.'s solvency, and although defendants in error absolutely knew when they advanced the \$10,000 that the guarantors would be compelled to pay it.

The true legal effect of this contract of guaranty as one absolute, is that the party receiving the guaranty obliges himself to, in good faith and fairly, decide on the safety to himself and to the guarantor of making the advances up to the \$10,000, and to make them, but not for any agreed time, if it be reasonably prudent to do so. If Wells, Fargo & Co. have no such right of option, then they must go blindly and forever, till forbidden, forward, and give Gordon the demanded credit, though, at the time, it is *certain*, as just as remarked, that the guarantors must pay and lose the advance, or, worse yet, though it is certain that both Gordon & Co. and the guarantors have become utterly insolvent.

But a still more conclusive objection to this 4th charge, (R. 18,) is that it ignores the fact that the guaranty does not pretend to bind Wells, Fargo & Co. to *continue, for any agreed length of time*, to give any credit. It gave an option to Wells, Fargo & Co. to continue the credit until the guaranty was in writing revoked. They did more than fully give the stipulated maximum of credit; for in the last

of November, 1874, (R. 8,) the overdraft was \$11,168.26. So that in every view they fully performed their contract. They did not agree to continue this for any time. This 4th charge (R. 18) ignored and violated all this.

V.

The 5th charge asked by plaintiff in error (R. 18) was, in effect, that before plaintiff below had any right of action it must demand payment of Gordon & Co., and notify guarantors of Gordon's default.

If there were no other reason why the court should refuse this charge, the fact that there was no testimony to warrant such charge is sufficient to justify its rejection.

Witness Wardsworth (R. 7, 8, 9) swears to the presentation of this account to Gordon & Co., its being assented to, and their "frequent" (R. 8) promises to pay it, and no *one disputes* these demands on Gordon & Co. *before suit*.

Witness Eoff (R. 11, 12, &c.) swears positively to the demand on guarantor Patrick, and the written notice to pay sent to Davis, and the attempt to see Davis in person to make the demand, and his evasion of such personal notice. Davis *admits* that, before the suit brought, he was notified of the amount owing by Gordon & Co., and of his liability on the guaranty. (R. 16.)

Patrick swears demand and notice were served on him in May, 1876. (R. bottom of 16 and top of 17.)

So that the demand and notice to which this charge five (R. 18) relates is both proved, uncontradicted, and admitted. Whether it was *reasonable in time* depends upon whether any loss occurred from alleged delay. And no such loss can here be successfully asserted. A refusal to give instructions not warranted by the evidence is not error. (*Rhett v. Poe*, 2 How., 457, 483.)

But the instruction asked was not law. It demanded broadly, generally, and without any qualification that the

jury should be told that there could be no right of action on this guaranty in the absence of demand on Gordon & Co., and notice of default to guarantors. It left out wholly all qualification as to damage resulting from delay of the notice.

It is hardly necessary to cite authorities to show how far from accurate such a broad and unqualified instruction would be.

That it is not law, see

Rhett *vs.* Poe, 2 How. 457, and cases there cited.

Vinal *vs.* Richardson, 13 Allen, 521.

The result of all the cases as cited in Wade on Notice, sect. 417, note 6, is thus there stated: "The foregoing authorities leave the doctrine" (as to the necessity of notice) "to turn upon a question of negligence of guarantee, by which the guarantor suffers detriment—or rather would suffer detriment if he were still held on his contract of guaranty." And the following cases are cited: 9 Serg. & R., 198; 71 Penn. St. R., 100; 25 Mich., 351; 33 Ia., 293; 59 Penn. St., 178.

This instruction 5 (R. 18) was further erroneous in taking no notice of the proposition of law asserted by this court in Rhett *vs.* Poe, 2 H., 457, that where due diligence fails to find the party to be notified, there notice is excused. Davis in this case was searched for, for the purpose of being notified, and refused to be seen. (R. 12.)

POINTS IN PLAINTIFF'S BRIEF.

The foregoing in this argument was prepared before the brief for plaintiff was filed or seen by us. We think what has been said meets all the material parts of that brief.

We, however, at the risk of some repetition, notice some of the points of that brief.

I.

It will be observed that every case decided by this court and relied on by the opposing brief is broadly distinguishable from this case by the difference between the instruments of guaranty as found in all of said adjudged cases and in this case.

In the case of *Russel vs. Clark*, 7 Cr., 69, the alleged contract of guaranty was in letters to the party asserting the guaranty—were mere overtures or requests—had no semblance of a contract *inter partes*—were at the utmost mere letters of credit, and besides in that case no question of notice was in fact decided.

The case of *Edmondson*, 5 Pet., 624, the letter was of the same character—a mere proffer of guaranty; (see the letter, 5 Pet., 631;) and it was not even addressed to the party who sued on it.

The case of *Douglass vs. Reynolds*, 7 Pet., 113, was also on a mere overture in a letter of credit which showed on its face that it was not certain that the party whose credit was guaranteed would require any credit. The letter said: "Harding may require your aid from time to time." (See letter, 7 Pet., 113.) And regarding this decision we beg the special attention of the court to what is said by the court at the bottom of page 122 bearing upon another point in the present case, to wit: upon the rule of construction which this court applies to the terms of these guarantees. The court there says:

"It was recognized by this court in *Drummond v. Prestman*, 12 Wheat., 515, as a rule in expounding them, that the words of the guarantee are to be taken as strongly against the guarantor as the sense will admit. (Fell on Guarantee, ch. 5, p. 129, &c.) And the same rule was adopted in the King's Bench in *Mason v. Pritchard*, 12 East, 227." (See also *Laurance v. McCalmont*, 2 How., 449.)

Apply this rule to the present guaranty, saying it HEREBY

guarantees "unconditionally"; that it is to be an open and continuing one; that Davis and Patrick had been paid by Wells, Fargo & Co. for making this guaranty, &c., and it seems utterly impossible to doubt that it operates from delivery and without notice of acceptance, or of advances as made, to bind the parties for such advances, because it is a contract *inter partes* effective and unconditional at delivery.

The case of *Lee v. Dick*, 10 Pet., 482, was on a letter of the same general character. The letters are on page 492, and are ordinary proffers of guaranty contained in a letter. The same is true of case in 12 Pet., 207.

These are the cases in this court relied on by plaintiff in error. In view of them all, it is certainly safe for us to apply to them the words of Justice Story in *Wilds v. Savage*, 1 Story R., 32, *supra*, where, after citing the same cases as the plaintiff here cites, and in view of all of them, he uses the words: "*This doctrine, however, is not applicable to the circumstances of the present case, for the agreement to accept was CONTEMPORANEOUS with the guaranty.*"

II.

The next point we notice in plaintiff's brief is that it does not appear that there was any overdraft when the guaranty was delivered. (See brief, p. 16.) This is said because Wardsworth testifies that at the close of the day of the delivery of the guaranty, November 11, 1874, the overdraft was \$9,015.06, but does not say what it was during that day. Counsel wholly overlook the fact sworn to by the same Wardsworth, (R. p. 7,) that he did *not* omit to state how the account stood at the moment, on that 11th day of November, when the guaranty was delivered. He says: "At that date" (speaking of when the guaranty was delivered) "Gordon & Co. were overdrawn at the plaintiff's bank." The written guaranty set forth in the declaration avers in effect the same thing. Not a syllable in the entire

record contradicts either this sworn testimony or this solemn admission by defendants in their sealed instrument of guaranty; and yet the defendant asks the court to *presume* that this guaranty is all for *future* advances, and this being *presumed*, asks that the law applicable to future advances, and *not* applicable to the guarantee of a known existing debt, (10 Pet., 496,) and which is not applicable to even *future* advances where the guaranty is by its terms unconditional, and one between parties whose minds are shown by the words of the instrument to have met "simultaneously" with the delivery of the instrument.

III.

Still another point in plaintiff's brief we wish to notice is that on page 15, where it is said this guaranty is not an unconditional one, that the word "unconditional" does not take it out of the rule requiring notice, because such requirement of notice of acceptance is founded on the doctrine that there is no contract—no meeting of minds until such notice is given. Hence the word "unconditional" in this guaranty does not, by itself, dispense with notice or make out a meeting of minds. An obvious reply to this point we have already given, relying on the case of *Wilds v. Savage*, 1 Story, approved by this court in *Louisville Manufacturing Co. v. Welch*, 10 How., 475, where the case of *Wilds and Savage* is approved. In this case the guaranty is proved by plaintiff's witness Gordon (R. 14) and by defendant's witness Wardsworth (R. 7) to have been drawn up by the defendant Wells, Fargo & Co. through its principal agent, Wardsworth, and to have been sent by the defendant in error, thus approved by Wells, Fargo & Co., for the signatures of Davis and Patrick. Defendants in error wrote in it words expressly declaring that they approved and accepted it when they said therein that they had paid a consideration to the other

party for the guaranty. They made it to at once and "unconditionally" operate at the moment of delivery by saying we *hereby* guarantee.

Hence all the terms of the instrument, as well as all the circumstances surrounding its making, (see 1 How., 169,) show that it *was accepted and approved by Wells, Fargo & Co. before delivery*, and that it was complete, mutual, and binding on execution and delivery. The word "unconditionally" in this instrument is, therefore, not, as the plaintiff's brief seems to assume, the only or the principal thing here appearing establishing the proposition that this became a complete, mutual, and binding contract according to its terms at the moment of delivery.

IV.

Another point in plaintiff's brief we notice is that stated at pages 17 to 19, which in effect is that Gordon failed between the time in April, 1875, when further credit was refused him, and the time in September, 1875, when Patrick was first notified of the liability on the guaranty.

If this point is meant to here raise the question whether there is error in the record in that the court below refused to give plaintiffs in error the benefit of the proposition of law, that where a delay in giving notice of advances to a guarantor is shown to have resulted in damages to such guarantor, there the guarantor is discharged, then that question cannot be raised in this court for the first time.

It was not only not specifically raised below, either directly or indirectly, but, on the contrary, what the court below said, to wit, (R. 24, near bottom,) that "*there is no claim on the part of the appellants that they have been in the least damaged from the want of notice,*" is strictly borne out by the record. No proof was offered to show that the want of notice was the cause of loss to guarantors. No averment

in the answer so alleged. No charge or exception raised or alluded to on the trial presented this point, and it is heard for the first time in the brief in this court. It cannot be presented here for the first time.

V.

If the view just taken of the second point in the plaintiffs' brief (p. 17) is not the one meant, and it means to assert that the obligation imposed by this instrument of guaranty upon Wells, Fargo & Co. is such that the defendants in error cannot, unless they gave notice of advances, recover upon it in any event or under any state of facts regarding damages having resulted from the want of notice of advances made, then the point is not tenable. The point seems to be based on the refusal of charge 2. (R. 18.) That charge left wholly out of view the rule of law above announced in the above quoted section 417 of Wade on Notice, and in the authorities there cited. If the want of notice of advances resulted in no damage to the guarantor, then the absence of all notice is no ground for defeat of recovery. But this second charge ignored this, and asked an absolute, unqualified charge that there could be no recovery unless a notice was given.

Here, neither the answer nor the proofs pretended that damages had resulted from the want of notice of advances, and to have instructed the jury, as asked in this second charge, that there was no right of recovery unless a notice was given, would have been error.

But more than this. It is perfectly competent for a guarantor to make such an absolute and unconditional guaranty as shall waive and dispense with all notice, both of acceptance of the guaranty and of all advances thereunder. And this is precisely what this guaranty does. It is an "*unconditional*" promise to pay whatever (not exceeding \$10,000) the party guaranteed might advance. It put upon the

guarantors the duty of taking care of themselves as to the matter of the extent and duration of the advances. It reserved to the guarantors the right at any time to put an end to further advances by a revocation in writing. Until then it was to be "*open*," "*continuing*," and "*UNCONDITIONAL*." To say that *such* a guaranty was not unconditional, but was conditional, and no liability was to exist, is not only an interpretation not "*liberally*" construing this instrument, but is one which cuts out of it its express and most emphatic words. This court has, in at least three cases, pronounced against all such attempts to so interpret and destroy such commercial instruments. In the case above cited of *Laurance v. McCalmont*, 2 How., 449, (15 Curtis, 182,) this court says:

"We should never forget that letters of guaranty are commercial instruments, generally drawn up by merchants in brief language, sometimes inartificial, and often loose in their structure and form; and to construe the words of such instruments with a nice and technical care would not only defeat the intentions of the parties, but render them too unsafe as a basis to rely on for extensive credits so often sought in the present active business of commerce throughout the world. The remarks made by this court in the case of *Bell v. Bruen*, 1 How., 169-186, meet our entire approbation. The same doctrine was asserted in *Mason v. Pritchard*, 12 East, 227, where a guarantee was given for any goods he hath or may supply W. P. with to the amount of £100; and it was held by the court to be a continuing guarantee for goods supplied at any time to W. P. until the credit was recalled, although goods to more than £100 had been first supplied and paid for; and the court on that occasion distinctly stated that the words were to be taken as strongly against the guarantor as the sense of them would admit of. The same doctrine was fully recognized in *Haigh v. Brooks*, 10 Adol. & El., 309, and in *Mayer v. Isaac*, 6 Mees. and Wels., 605, and especially expounded in the opinion of Mr. Baron Alderson. It was the very ground, in connection with accompanying circumstances, upon which this court acted in *Lee v. Dick*, 10 Pet., 482,

and in *Mauran v. Bullus*, 16 Pet., 528. Indeed, if the language used be ambiguous, *and admits of two fair interpretations, and the guarantor has advanced his money on the faith of the interpretation most favorable to his rights, that interpretation will prevail in his favor*; for it does not lie in the mouth of the guarantor to say that he may, without peril, scatter ambiguous words, by which the other party is misled to his injury."

It seems to us quite impossible to resist the conclusion that the present guaranty not only "*fairly admits*" of the interpretation that it is absolute and unconditional as a promise to pay whatever was advanced on the faith of it, waiving all notices of the advances, but that it admits of no other interpretation. To make the promise one "*conditioned*" on giving the notices required in case of an ordinary letter of credit, is to turn an instrument which, on its face, is unconditional, into one conditional.

This court has said this may not be done. Words may be read in the light of surrounding circumstances, but may not only not be expunged, but when susceptible fairly of two meanings, that one must be given most favorable to the guarantee who has advanced money on the faith of such words.

This view, therefore, independently of all others, makes the rejection of the second charge (R. 18) clearly right.

VI.

The plaintiff's third point (Brief 20) relates to the refusal of charge 3. (R. 18.) Amongst the other errors in this request is the obvious one that it asked the court to instruct the jury, as a matter of positive law, that the omission to give notice of advances for "twelve months or upwards after the last advances," was not a reasonable notice. There is no such rule of law in any case; because, where notice is required, what is reasonable depends on the facts of *that case*. And as in this case there is no claim of damages

having resulted from want of notice, therefore, *in this case*, even if notice were not waived by the guaranty, the twelve months' delay would not (as was requested to be said to the jury) discharge the guarantors.

But, independently of this, as we have attempted to show last above, this is a guaranty dispensing with notice, and hence this charge was properly refused.

The authority of *Douglas v. Reynolds*, 7 Pet., 126, and all other like cases, can have no possible application to the present guaranty—absolute, and waiving all notices by reason of being absolute and unconditional.

Besides this, as regarding the case of *Douglas v. Reynolds*, this court says, in *Louisville Manufacturing Co. v. Welch*, 10 How., 474 :

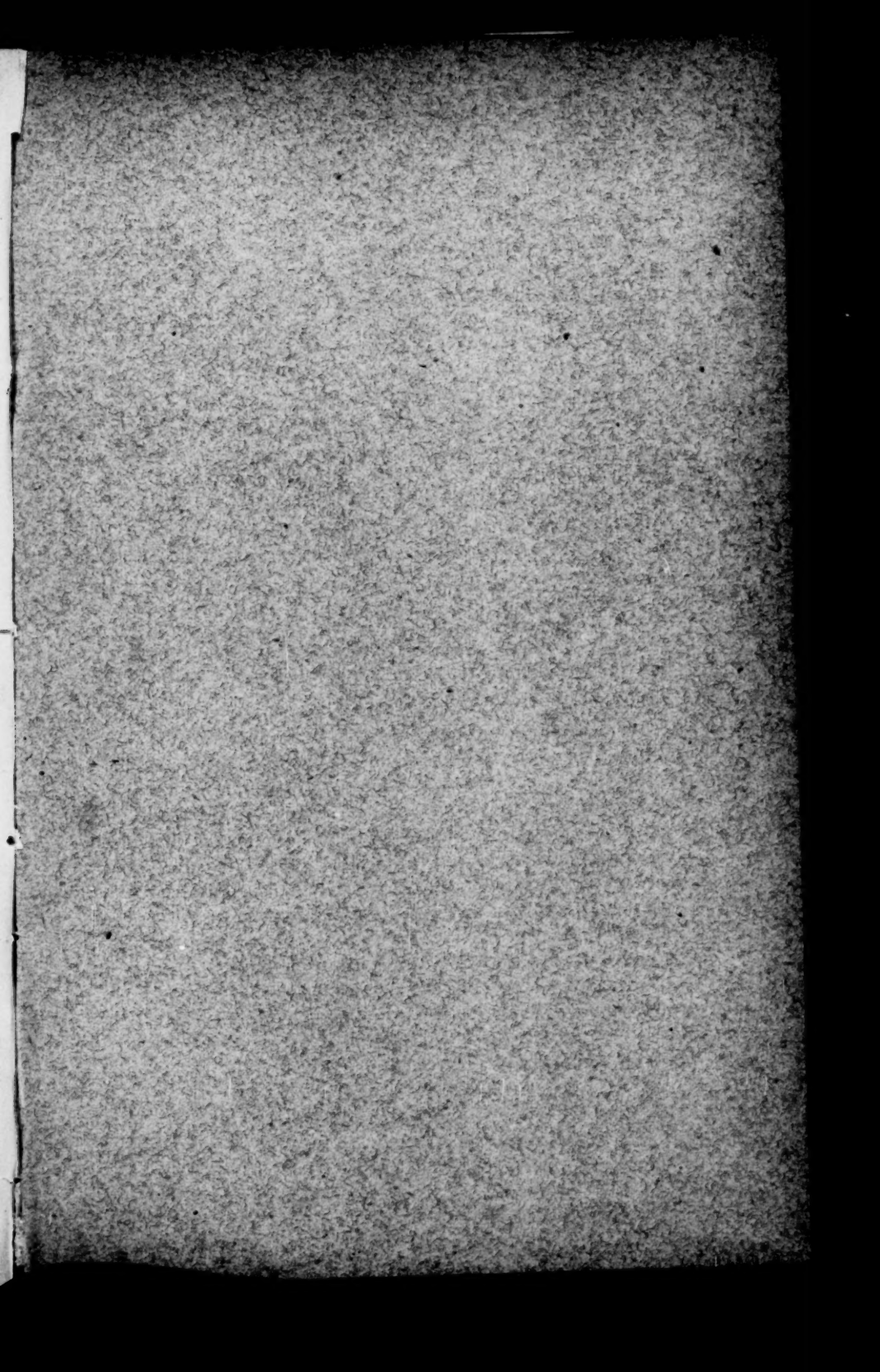
“When the case came before the court a second time—and which is reported in 12 Pet., 479—the principle here stated was somewhat modified, the court holding that in case of the insolvency of the principal debtors, and total inability to respond to the surety before the debt fell due, the demand and notice *might be dispensed with*.”

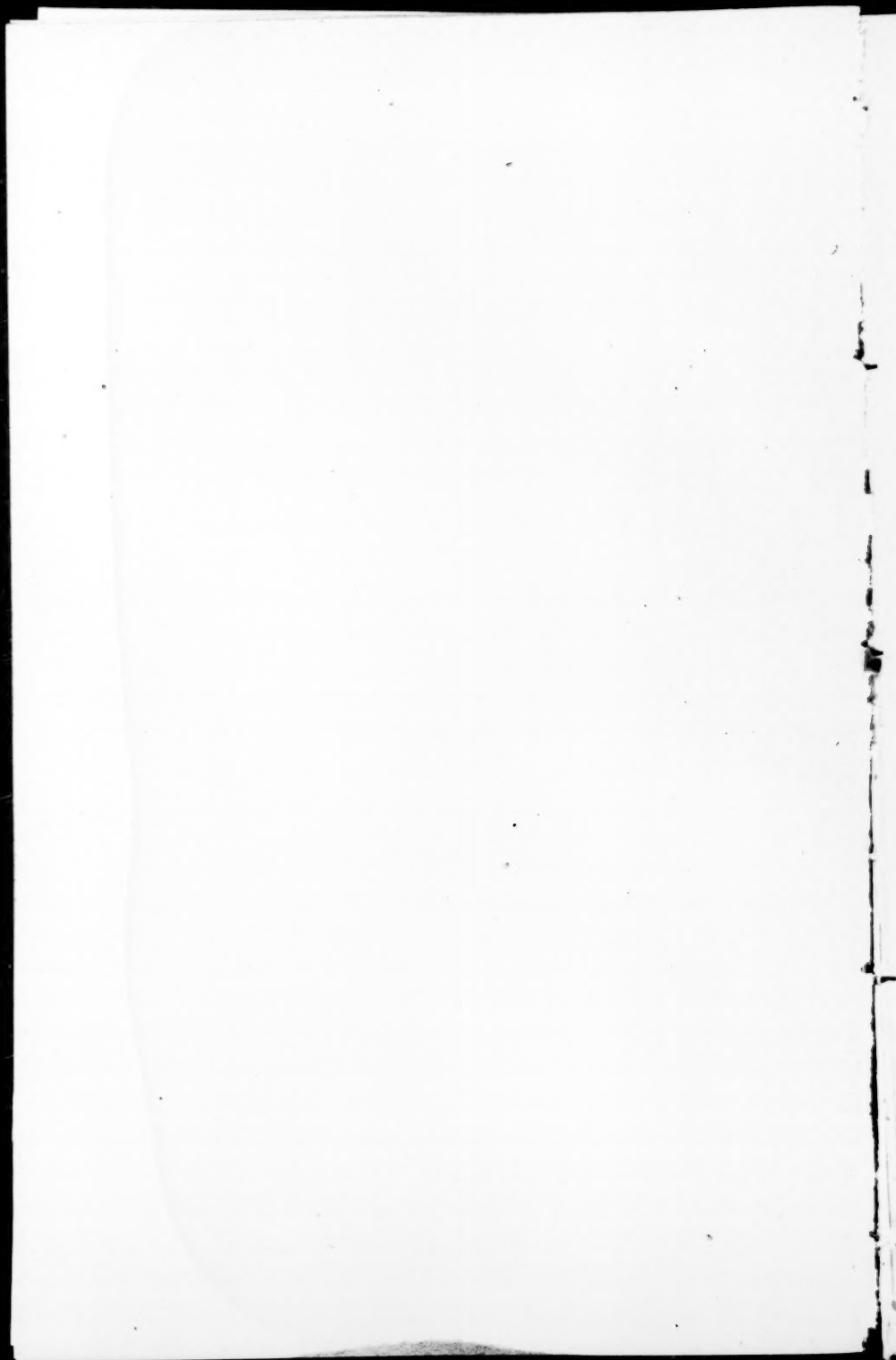
Even, therefore, were this a case where the guaranty did not itself dispense with notice, still the want of notice, *and a resulting damage*, are *both* matters of defense which must each be set up in the answer and established by the proofs.

This precise proposition has been often decided by the highest authorities, to wit, that where, as here, the guaranty is absolute and unconditional, the matter of want of notice and resulting damages, if admissible at all, are *matters of defense* which must be averred and proved. (See *Clay v. Edgerton*, 19 O. S. R., 549, and cases cited, p. 554.)

This claim of resulting damages *not* being made in the present case—neither in the pleading nor proof—all instructions asked regarding the want of notice were inappropriate, and properly rejected.

SHELLABARGER & WILSON,
Counsel for Defendants in Error.





14-171

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. 307. 63

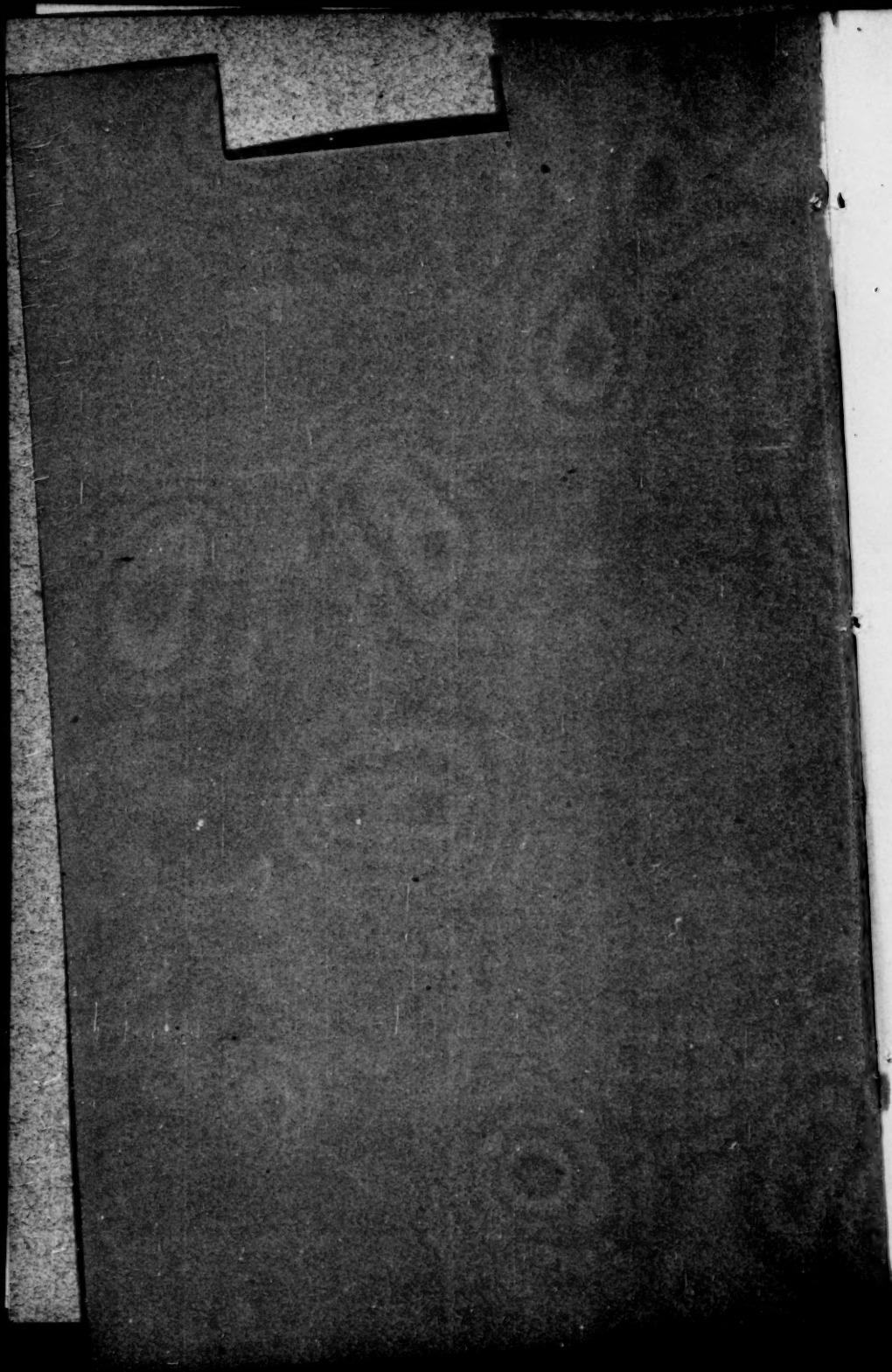
WILLIAM T. PORTER, IMPEADED WITH J. MORTON POOLE
AND W. G. NORWOOD, PLAINTIFF IN ERROR,

VS.

JENNIE L. GRAVES, AS ADMINISTRATRIX, &c., OF CYRUS
GRAVES, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 21. 1878.



SUPREME COURT OF THE UNITED STATES.

No. 307.

WILLIAM T. PORTER, IMPEADED WITH J. MORTON POOLE
AND W. G. NORWOOD, PLAINTIFF IN ERROR,

VS.

JENNIE L. GRAVES, AS ADMINISTRATRIX, &c., OF CYRUS
GRAVES, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
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INDEX.

	Original.	Print.
Judgment record.....	1-24	1
Order docketing case in United States court.....	1	1
Copy summons in State court.....	3	1
Certified copy order removing cause from State court.....	5	1
Notice of defendant's appearance in United States court.....	7	2
Amended complaint and consent for filing same indorsed thereon...	9	3
Answer to amended complaint.....	15	6
Clerk's minutes of trial.....	18	8
Order denying motion for new trial.....	22	10
Statement of judgment.....	23	11
Bill of exceptions.....	25	12
Opinion of Wheeler, J.....	92	74
Bond on writ of error.....	97	78
Writ of error.....	103	80
Citation.....	107	80
Clerk's certificate.....	109	81



1, 2 At a stated term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the city of Albany, on Tuesday, the 8th day of October, in the year of our Lord one thousand eight hundred and seventy-two.

Present, the honorable Lewis B. Woodruff, circuit judge.

JENNIE L. GRAVES, ADMINISTRATRIX, &C., OF
Cyrus Graves, deceased,
ag't
WILLIAM T. PORTER, IMPEADED WITH J. MOR-
ton Poole and W. G. Norwood.

On reading and filing copy of summons and certified copy of order removing case from the supreme court of the State of New York into this court, ordered that this case be entered on the law docket of this court and be proceeded in as if it had been commenced here by original process.

3, 4 *Summons for money.*

Supreme court, county of Cortland.

JENNIE L. GRAVES, ADMINISTRATRIX, &C., OF
Cyrus Graves, deceased, plaintiff,
against
J. MORTON POOLE, WILLIAM T. PORTER, AND
W. G. Norwood, defendants.

To J. Morton Poole, William T. Porter, and W. G. Norwood, defendants:

You are hereby summoned to answer the complaint of Jennie L. Graves, administratrix of Cyrus Graves, deceased, plaintiff, which will be filed in the office of the clerk of Cortland County, at Cortland, N. Y., and to serve a copy of your answer on the subscriber at Dryden, in Tompkins County, N. Y., within twenty days after the service of this summons, exclusive of the day of service, or the plaintiff will take judgment against you for five thousand dollars, with interest from the first day of January, one thousand eight hundred and sixty-six, besides costs.

M. GOODRICH,
Plaintiff's Attorney.

5 At an adjourned special term of the supreme court, held in and for the State of New York, at the chambers of the Hon. William Murray, jr., one of the justices of the supreme court, in Delhi, in the county of Delaware, on the 29th day of June, 1872.

Present, the said the Hon. William Murray, jr., justice as aforesaid.

6 JENNIE L. GRAVES, ADMINISTRATRIX OF
Cyrus Graves, deceased, plaintiff,
against
WILLIAM T. PORTER, IMPEADED WITH J.
Morton Poole and W. G. Norwood, defendants.

A petition having been filed by the defendant, William T. Porter, in this action, in the form provided by law, praying for a removal thereof

into the circuit court for the southern district of New York, pursuant to the statutes of the United States in such case made and provided; and the said petitioner having offered a bond conditioned for the defendant's appearance in the southern district of New York; and this court, at a special term thereof, held at the court-house in the village of Cortland, in the county of Cortland, and State of New York, on the first day of April, 1872, having denied the application to remove the said cause for trial to the southern district of New York, and held and decided that the case should be removed to the northern district of New York, and refused to make the order for the reason that the bond filed was conditional for the defendant's appearance in the southern district of New York, and holding that in other respects the bond was sufficient and correct, and this motion having been continued by the orders of this court to special term of this court, to be held before the Hon. William Murray, jr., one of the justices of this court, at his chambers in the village of Delhi aforesaid, on the said 29th day of June, 1872, and the said petitioner having now offered good and sufficient security conditioned for defendant's appearance in the northern district of New York, pursuant to the directions of and as required by the said statute. Now, on motion of Henry R. Mygatt, of counsel for the petitioner, and after hearing the Hon. Milo Goodrich, of counsel for the plaintiff in opposition thereto, it is declared that it is made to appear to the satisfaction of this court that the present suit is commenced in this court by a citizen of the State of New York against a citizen of another State, and that the matter in dispute exceeds five hundred dollars, exclusive of costs. And it is hereby further declared and ordered that this court accepts the surty offered by the petitioner, and that the said cause be removed for trial into the next circuit court to be held in the northern district of the State of New York, pursuant to the said statutes, and that this court do proceed no further therein, and that all proceedings in this court in the said cause be and the same are hereby stayed.

(Copy.) Entered July 10, 1872.

FRANK PLACE,
Clerk of Courtland County.

7

Notice of appearance.

United States circuit court, northern district of New York.

JENNIE L. GRAVES, ADMINISTRATRIX, &C., OF	}
Cyrus Graves, dec'd,	
<i>against</i>	
WILLIAM T. PORTER, IMPEADED WITH J.	}
Morton Poole et al.	

SIR: Please to take notice that the defendant, William T. Porter, appears to this action, and that we are retained as attorneys for said William T. Porter therein.

Dated New York, Sept. 20th, 1872.

Yours, &c.,

SCUDDER & CARTER,
Defendant's Attorneys, No. 66 Wall street, N. Y. City.

To clerk U. S. circuit court, northern dist. of N. Y., and to Milo Goodrich, esq., pl'ff's att'y.

8

(Endorsed:) U. S. circuit court, northern dist. of New York.

Jennie L. Graves, adm'x, &c., of Cyrus Graves, dec'd, plaintiff, against J. Morton Poole et al., defendants. Notice of appearance. Scudder & Carter, att'ys for def'ts, Wm. T. Porter.

SIR: Please enter the appearance of the def't, Wm. T. Porter, herein by us.

SCUDDER & CARTER,
Att'ys for Def't, Wm. T. Porter.

To clerk U. S. circuit court, north. dist. of N. Y.

Filed Oct. 8, 1872.

9 Circuit court of the United States for the northern district of New York, of the March term, 1873, that is to say, of the 18th day of March, 1873.

JENNIE L. GRAVES, AS ADMINISTRATRIX, &C., }
of Cyrus Graves, deceased, }
against }
WILLIAM T. PORTER, IMPEADED WITH J. }
Morton Poole and W. G. Norwood. }

NORTHERN DISTRICT OF NEW YORK, ss :

Jennie L. Graves, as administratrix of all and singular the goods, chattels, and credits of Cyrus Graves, deceased, plaintiff, by M. 10 Goodrich, her attorney, complains of William T. Porter, impleaded with J. Morton Poole and W. G. Norwood (whose christian name is unknown to the plaintiff), defendants in this action, and alleges and shows to the court :

That the said plaintiff was, at the time of the commencement of this action, and still is, a citizen of the State of New York, and that the said defendants then were not, and still are not, nor was or is either of them citizens or a citizen of that State, but were and are citizens of other States, that is to say, the said Porter and the said Poole were and are citizens of the State of Delaware, and the said Norwood a citizen of the State of North Carolina.

That the above-named Cyrus Graves, who was at the time of his death the plaintiff's husband, died intestate on or about the 5th day of September, 1862, in the State of Georgia, being at that time a resident and citizen in the county of Thomas, in that State, wherein he left, at his death, personal property in part, consisting of the saw-mill hereinafter mentioned; leaving also him surviving his widow, the plaintiff, then resident in the said county of Thomas. That afterwards, and in or about the 3d day of November, in the year last aforesaid, upon due application made, she was, by the ordinary and the court of ordinary in and for the said county of Thomas, having full authority and jurisdiction so to do, duly appointed administratrix of all and singular the goods, chattels, and credits of the said deceased intestate, under and in conformity with the laws of the said State of Georgia; that the plaintiff duly qualified under said appointment, and letters of administration thereunder were duly issued to her as such administratrix, whereby she became duly qualified and empowered as such in conformity with the laws aforesaid, and whereby also the goods, chattels, and credits of the said Cyrus Graves, deceased, became vested in her as such administratrix aforesaid, to be sold and disposed of by her according to law.

That the saw-mill above mentioned consisted of building with the

necessary tools, implements, and machinery for sawing and manufacturing lumber and timber, erected by the plaintiff's said intestate in his lifetime on the lands of one Mattox, at or near Homerville, in Clinch County, in the said State of Georgia, under an agreement between him and the plaintiff's said intestate in his lifetime, that the same should there stand to be used in sawing and manufacturing lumber and timber for their joint benefit temporarily, with the further stipulation that the same should be and remain the personal property of the plaintiff's said intestate in his lifetime, subject to be disposed of, and removed as such by him, his executors, administrators, or assigns for his or their benefit, whenever the same should cease to be employed for the purpose aforesaid, whereby the said saw-mill became and continued to be such personal property as aforesaid, belonging to the plaintiff's said intestate vesting at his death, and upon the plaintiff's becoming such administratrix aforesaid, in her as such, to be by her, with the other personal effects of the said deceased, disposed of according to law.

11 That the said Porter, Poole, and Norwood, at the several dates hereinafter mentioned, were, and they represented to the plaintiff that they were partners in the business of sawing and manufacturing lumber and timber, and of procuring, and owning, and operating a saw-mill for that purpose, at or near Homerville aforesaid. That, so being and representing, they, as such partners, on or about the first of December, 1865, applied to the plaintiff to purchase of her the said saw-mill, then of the value of five thousand dollars; whereupon negotiations were commenced and continued, partly in Taylor, in Cortland County, in the said State of New York (where the plaintiff was then temporarily living), and partly in Homerville aforesaid and elsewhere, by and through which the plaintiff, as such administratrix aforesaid, relying upon the representations aforesaid, pursuant to the order, sanction and authority of the said ordinary and court of ordinary, duly made and given, did agree to sell and deliver to the said Porter, Poole, and Norwood, as such partners as aforesaid, the said saw-mill, including said tools, implements, and machinery, and by and through which they, as such partners, agreed to purchase, and did purchase the same of her, the said administratrix, at and for the price of five thousand dollars, it being in said agreement understood and stipulated, and the plaintiff should, and she did, make delivery of the said saw-mill to the said purchasers on or about the first day of January, 1866, and thereupon, if they should require, that the plaintiff should make application to the said ordinary and court of ordinary for an order to sell, and thereunder should make sale of the said saw-mill to them by public sale through public outcry in the said county of Thomas, in conformity with the laws of the said State of Georgia; it being further understood and stipulated that they, the said purchasers or some one or more of them, or some one duly authorized to act for them in that behalf, should be present and bid off the said bargained and purchased property at such public sale through public outcry, in order to the completing and perfecting of the title of said property in them in conformity with the laws of the said State of Georgia. That the said purchasers did so require, and thereupon the plaintiff, as such administratrix, relying upon the representations, the agreement and stipulations aforesaid, did make application and obtained from the said ordinary and court of ordinary the order aforesaid duly made and given, authorizing the plaintiff, as such administratrix aforesaid, to sell said saw-mill, including said tools, implements, and machinery, at public sale through public outcry; and so relying upon the representations, the agreement and stipulations afore-

said, the plaintiff went to the said State of Georgia, and caused due and public notice of said sale to be given, of the time and place and when and where the same would be made, to wit, at the then late residence of the plaintiff's said intestate, known as his steam-mill place in the county of Clinch in the State of Georgia aforesaid, on the 30th day of April, 1866; at which time and place, pursuant to such notice and the said order, and in conformity with the laws of the said State of Georgia, the said saw-mill, including said tools, implements, and machinery, were duly sold at public sale through public outcry, and 12 the said Porter, Poole, and Norwood, as such partners and purchasers aforesaid, and pursuant to their aforesaid agreement and stipulation, were, by one of said partners, present and became the highest bidders for said property, to whom the same was then and there knocked off at and for the price of five thousand dollars; whereupon, as the plaintiff avers, their title to said property, upon the sale thereof to them so negotiated and completed as aforesaid, became and was, under the laws of the said State of Georgia, completed and fully perfected, the plaintiff thereupon again giving and ratifying full possession of said property to them, said Porter, Poole, and Norwood as such partners and purchasers thereof under the negotiations and sale or sales aforesaid.

And they, as such partners and purchasers, thereupon took, accepted, and entered into full possession of said property under such purchase, and used and applied the same to the business and purposes of their said partnership; whereby they, as such partners, then became justly indebted to the plaintiff as such administratrix, in the said sum of five thousand dollars, which, although then and afterwards the plaintiff often demanded, they, said partners and purchasers, have never paid, but still remain justly indebted to the plaintiff, as such administratrix aforesaid, therefor, together with interest thereon from the 30th day of April, 1866.

That afterwards and on or about the 3d day of June, 1871, the said Jennie L. Graves, the plaintiff, ceased to be a citizen in the said State of Georgia, and became a citizen and an inhabitant in Taylor, in the county of Cortland and State of New York aforesaid, and being such administratrix aforesaid, and the said indebtedness accruing to her as such still continuing, she made due application to the county judge and surrogate of the said county of Cortland, and thereupon the said county judge and surrogate, having full power and authority under the laws of the said State of New York so to do, duly appointed her, the said plaintiff, administratrix of all and singular the goods, chattels, and credits of the said Cyrus Graves, deceased, within the said last mentioned county and State; under which said last mentioned appointment the plaintiff then and there duly qualified, and letters of administration thereunder duly issued to her as such administratrix as last aforesaid, whereby she became fully qualified and authorized as such, before the commencement of this action; which said letters of administration so issued by the said county judge and surrogate, bearing date the day and year last aforesaid, also the said letters of administration so issued by the said ordinary and court of ordinary, bearing date on or about the 3d day of November, 1862, and also the said order of the said ordinary or court of ordinary, bearing date on or about the 5th day of March, 1866, the plaintiff hereby offers to bring and will bring into court and make open proof thereof upon the trial of this action.

Wherefore the plaintiff charges and alleges that, for the cause and by reason of the premises hereinabove set forth, the said William T.

Porter and J. Morton Poole, and W. G. Norwood, as such partners as aforesaid, became and still are justly indebted to the plaintiff, as such administratrix as aforesaid, in the sum of five thousand dollars, 13 with interest from the 30th day of April, 1866; for which sum and interest the plaintiff, as such administratrix, demands judgment against the defendants and against the said Porter, impleaded as aforesaid, together with her costs and disbursements in this action.

M. GOODRICH,
Attorney for Plaintiff.

STATE OF NEW YORK,
Tompkins County, ss:

Jennie L. Graves, being duly sworn, says that she is the plaintiff named in the foregoing amended complaint or declaration; that she has heard the same read and knows the contents thereof; that the same is true of her own knowledge, except as to the matters stated on information and belief, and as to those matters she believes it to be true.

JENNIE L. GRAVES.

Subscribed and sworn March 15th, 1873, before me.

CHAS. L. THOMAS,
U. S. Com'r.

14 (Endorsed:)

We consent that the within be filed as the amended complaint of the plaintiff herein, and waive service of any further notice to plead, the plaintiff having this day served a copy on us.

Dated March 19, 1873.

SCUDDER & CARTER,
Def't Porter's Att'ys.
M. GOODRICH,
Pl'ff's Att'y.

Filed March 25, 1873.

15 Circuit court of the United States for the northern district of New York, of October term, 1872, to wit, of March 31st, 1873.

JENNIE L. GRAVES, ADMINISTRATRIX, &C.,	}
of Cyrus Graves, deceased,	
<i>against</i>	
WILLIAM T. PORTER, IMPL'D WITH J. MORTON	}
Poole and W. G. Norwood.	

The defendant, William T. Porter, by Scudder and Carter, his attorneys, for answer to the complaint of the plaintiff, admits that the plaintiff was and still is a citizen of the State of New York, and that the defendants are not and were not citizens of said State, and that the defendant Porter is and was a citizen of the State of Delaware, and the said J. Morton Poole is and was a citizen of the State of Delaware, and the defendant Norwood is and was a citizen of the State of North Carolina.

And defendant, further answering, says that he has no knowledge nor information sufficient to form a belief as to whether Cyrus Graves was the husband of the plaintiff, or whether he died intestate, or at the time mentioned in the complaint, or was a citizen of the 16 State of Georgia, or left personal property therein, or whether the plaintiff at any time resided therein, or was duly or at all appointed administratrix of the goods, chattels and credits of said Cyrus

Graves, or whether letters of administration were granted and issued to the plaintiff, or whether the plaintiff qualified as administratrix. And the defendant leaves the plaintiff to the proof of all the allegations in that behalf in the complaint contained. And defendant admits that a certain saw-mill, with machinery and appliances for the sawing and manufacture of lumber, stood on certain land at or near Homerville, in Clinch County, in the State of Georgia, but has no knowledge nor information sufficient to form a belief as to whether it was erected by the said Cyrus Graves, or on whose lands or under what agreement, or how long the same was to stand, or whether it was or was to continue to be the personal property of said Cyrus Graves, or when it ceased to be employed as a saw-mill, and leaves the plaintiff to make proof thereof.

And defendant admits that he and the defendants Poole and Norwood were interested together in the business of sawing and manufacturing lumber at the time mentioned in the complaint, and contemplated and intended to procure by lease or purchase, or erect a saw-mill in the neighbourhood of Homerville, aforesaid, but said defendant denies that the defendants or either of them applied to the plaintiff to purchase the saw-mill described in the complaint, and alleged to have been the personal property of said Cyrus Graves in his lifetime, or to buy any personal property.

And defendant alleges that certain real property with the improvements thereon, consisting of a saw-mill and its machinery and appliances, which the plaintiff represented to them, she could convey, was the subject of negotiation between them, and that the defendants discovered that the same did not belong to and could not be conveyed by the plaintiff to them. And defendant denies that the plaintiff bargained and sold or delivered to the defendants, or either of them, or that the said defendants purchased or took and received of the plaintiff the saw-mill and buildings mentioned in the complaint, or the machinery, tools and implements, or any or either of them; and the said defendant denies that the defendants or either of them promised to pay to the plaintiff the price or sum of five thousand dollars or any other sum whatever; and the said defendant denies that the plaintiff delivered said saw-mill to the defendants, or any other property or thing, or that the defendants took or accepted or used the said saw-mill as or for their property; and the defendant denies that the defendants or either of them are indebted to the plaintiff in any sum whatever.

And defendant denies that the plaintiff had any authority to contract with defendant in reference to said mill in the form or under the circumstances alleged in the complaint, and alleges that by the laws of the State of Georgia in force at the time of the alleged agreement, the administrator of an intestate's estate was required to make all sales of the personal property of such intestate at public outcry.

And defendant denies that the defendants or either of them requested or required the plaintiff to procure the order to sell alleged in the complaint, or that the plaintiff did procure such order, or that the said ordinary had any power or jurisdiction to make the same, and the defendant denies that the defendants or either of them agreed to become the purchasers of said property at such alleged sale or that they did become such purchasers or that they took or accepted possession thereof, under any purchase thereof, and the defendant denies that under the laws of the said State of Georgia the plaintiff had authority to make the agreement alleged in the complaint; and

defendant alleges that the said alleged contract was contrary to said laws and void.

And defendants deny that the county judge and surrogate of Cortland County had jurisdiction to appoint the plaintiff administratrix as alleged in the complaint.

And defendant denies each and every allegation of the complaint not herein specifically admitted or denied.

SCUDDER & CARTER,
Defendant's Attorneys.

STATE OF PENNSYLVANIA,
County of Philadelphia :

William T. Porter, being duly sworn, deposes and says that he is one of the defendants in the above-entitled action ; that the foregoing answer is true to his own knowledge except as to the matters which are therein stated on information and belief, and as to those matters he believes it to be true.

WM. T. PORTER.

Sworn to before me this 31st day of March, 1873.

[L. S.]

SAMUEL L. SAYLER,
Notary Public.

STATE OF PENNSYLVANIA,
County of Philadelphia :

I, John A. Loughridge, prothonotary of the court of common pleas of said county, do certify that Sam'l L. Sayler, esq., before whom the annexed affidavit was made, was at the time & now is a notary public in & for the city of Philadelphia, duly commissioned and qualified to administer oaths & affirmations, & to take acknowledgments, &c., & to all whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere ; that we are well acquainted with his handwriting, & that his signature thereto is genuine. And I further certify that the said instrument is executed according to the laws of this State.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 31st day of M'ch, A. D. 1873.

[L. S.]

J. A. LOUGHRIDGE,
Prothonotary.

At a stated term of the circuit court of the United States of America, for the northern district of New York, in the second circuit, held at the village of Canandaigua, on Friday, the 22d of June, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, the honorable Hoyt H. Wheeler, judge.

Milo Goodrich and H. L. Comstock for pl'ff.

JENNIE L. GRAVES, ADMINISTRATRIX, &c., }
vs.
WILLIAM T. PORTER, IMPEADED, &c. }

George A. Black and D. B. Hill for def't.

19 On motion of Mr. Milo Goodrich, plaintiff's attorney, ordered that a jury be empannelled and that the trial of this cause do now proceed.

Whereupon the following named jurors were called and sworn :

Albert N. Knapp.
David Willys.
Hugh Fulton.
Menzo Colman.
John H. Crandall.
William G. Kelbie.

Ira Clemons.
Alexander A. Halsey.
George G. Smith.
William Chipps.
Hugh A. Gates.
Erastus Wensett.

Mr. Goodrich opens case for plaintiff.
Documentary evidence offered and received.
Court adjourned until 10 o'clock a. m. to-morrow.

Saturday, June 23d, 1877, 10 o'clock a. m., court met.
Present, Judge Wheeler.

JENNIE L. GRAVES, ADMINISTRATRIX, &C., }
vs. }
WILLIAM T. PORTER, IMPEADED, &C. }

Jury called ; 12 answered.
Trial continued.
Recess until 2 o'clock p. m.

2 o'clock p. m., court met.
Present, Judge Wheeler.

JENNIE L. GRAVES, ADMINISTRATRIX, &C., }
vs. }
WILLIAM T. PORTER, IMPEADED, &C. }

Jury called ; 12 answer.
Trial proceeds.
Court adjourned until Monday June 25, 1877, at 10 o'clock a. m.

20 Monday, June 25, 1877, 10 o'clock a. m., court met.
Present, Judge Wheeler.

JENNIE L. GRAVES, ADM'X, &C., }
vs. }
WILLIAM T. PORTER, IMPL'D, &C. }

Jury called ; 12 answered.
Trial proceeds.
Depositions read.
Plaintiff's witness, Jennie L. Graves.
Recess until 2 o'clock p. m.

2 o'clock p. m., court met.
Present, Judge Wheeler.

JENNIE L. GRAVES, ADM'X, &C., }
vs. }
WILLIAM T. PORTER, IMPL'D, &C. }

Jury called ; 12 answer.
Trial proceeds.

Plaintiff's witness, Jennie L. Graves, recalled.

Plaintiff rests.

Mr. Black opens case for defendant.

Depositions for defendant read.

Defendant's witness, William T. Porter.

Defendant rests.

Plaintiff's witness, Jennie L. Graves, recalled.

Court adjourned until 10 a. m. to-morrow.

- 21 Tuesday, June 26, 1877, 10 o'clock a. m., court met.
Present, Judge Wheeler.

JENNIE L. GRAVES, ADM'X, &C., }
vs.
WILLIAM T. PORTER, IMPL'D, &C. }

Jury called; 12 answered.

Trial proceeds.

Depositions read by plaintiff.

Jennie L. Graves recalled.

William T. Porter recalled.

Evidence closed.

Mr. Black requests court to direct verdict for defendant.

Recess until 2 o'clock p. m.

2 o'clock p. m., court met.

Present, Judge Wheeler.

JENNIE L. GRAVES, ADMINISTRATRIX, &C., }
vs.
WILLIAM T. PORTER, IMPL'D, &C. }

Jury called; 12 answered.

Argument continued by Mr. Black.

Court refuses to direct the jury, 1st, that the plaintiff is not entitled to recover; 2d, to direct the jury to find a verdict for the defendant.

Mr. D. B. Hill sums up case for defendant; Mr. Goodrich sums up case for plaintiff.

Court charges jury.

Jury retire in charge of a sworn bailiff to consider their verdict.

The jury here come into court, and being called, answer, and say they find a verdict for the plaintiff for \$8,904.44.

- 22 Ordered, That the defendant have sixty days in which to make and serve a case, with leave to turn the same into a bill of exceptions, and that in the mean time all other proceedings be stayed.

United States circuit court in and for the northern district of New York.
Of the March term, 1878.

JENNIE L. GRAVES, AS ADMINISTRATRIX, &C., }
of Cyrus Graves, deceased,
vs.
WILLIAM T. PORTER, IMPEADED WITH J. }
Morton Poole and William G. Norwood. }

This cause having been heretofore tried, to wit, at the June circuit of

this court held at Canandaigua, in June, 1877, before the honorable Hoyt H. Wheeler, judge, with a jury, and the verdict of the jury having been on the 26th day of the month and year aforesaid duly rendered and entered for the plaintiff for eight thousand nine hundred and four dollars and forty-four cents against the defendant, William T. Porter, impleaded as aforesaid, and leave having been given the said defendant to make a case and exceptions on which to move for a new trial (with leave to turn the same into a bill of exception), and the said case and exceptions having been made, and the said motion thereon heard and decided, and the decision thereof by the court having been filed, whereby said motion is denied and judgment is directed upon the said verdict with costs:

Now, on motion of M. Goodrich, attorney for the plaintiff, it is ordered by the court that the said motion for a new trial be, and the same hereby is, denied with costs. And it is further ordered that judgment upon the verdict of the jury be entered for the plaintiff against the defendant, William T. Porter, impleaded with J. Morton Poole and William G. Norwood in this action, for the amount of said verdict, including interest from the 26th day of June, 1877, together with the plaintiff's costs and disbursements in the action, to be taxed by the clerk.

23 United States circuit court, northern district of New York.

JENNIE L. GRAVES, AS ADMINISTRATRIX OF
Cyrus Graves, deceased, plaintiff,

vs.

WILLIAM T. PORTER, IMPEADED WITH J.
Morton Poole and William G. Norwood, de-
fendants.

This action having been brought by the plaintiff against the above named defendants upon a cause of action against them jointly, but only the defendant William T. Porter having been served with process, and having appeared and plead or answered in the action, and the issues in the action having been brought on for trial before the honorable Hoyt H. Wheeler, district judge of the district of Vermont, presiding, and a jury, at a circuit court of the United States, held at the village of Canandaigua, in and for the northern district of New York, on the third Tuesday of June, 1877; and the said issues having been tried and a verdict for the plaintiff having been duly rendered and entered for eight thousand nine hundred and four dollars and forty-four cents, on the 26th day of June, 1877; and the said defendant William T. Porter having thereupon, upon a case and exceptions duly made, moved for a new trial, and said motion having been heard and decided, and the decision of the court thereon having been filed, whereby said motion is denied, and judgment upon the said verdict is directed for the plaintiff, with costs; and order therefor having been duly made and entered, and it appearing that said verdict, with interest, amounts to \$9,535.16, and the plaintiff's costs having been taxed at \$407.37:

Now, therefore, on motion of Milo Goodrich, attorney for the plaintiff, it is adjudged by the court that the plaintiff, Jennie L. Graves, as administratrix as aforesaid, recover of the defendants nine thousand five hundred and thirty-five dollars and sixteen cents, found by the jury inclusive of interest since the rendition of their verdict, with \$407.37 costs, amounting in the whole to nine thousand nine hundred and forty-two dollars and fifty-three cents (\$9,942.53.)

and vesting at his death, and upon the plaintiff's becoming such administratrix aforesaid, in her as such, to be by her, with the other personal effects of the said deceased, disposed of according to law.

That the said Porter, Poole, and Norwood, at the several dates hereinafter mentioned, were, and they represented to the plaintiff 27½ that they were, partners in the business of sawing and manufacturing lumber and timber, and of procuring, and owning, and operating a saw-mill for that purpose, at or near Homerville aforesaid; that, so being and representing, they, as such partners, on or about the first of December, 1865, applied to the plaintiff to purchase of her the said saw-mill, then of the value of five thousand dollars; whereupon negotiations were commenced and continued, partly in Taylor, in Cortland County, in the said State of New York (where the plaintiff was then temporarily living), and partly in Homerville aforesaid and elsewhere, by and through which the plaintiff, as such administratrix aforesaid, relying upon the representations aforesaid, pursuant to the order, sanction, and authority of the said ordinary and court of ordinary, duly made and given, did agree to sell and deliver to the said Porter, Poole, and Norwood, as such partners as aforesaid, the said saw-mill, including said tools, implements, and machinery, and by and through which they, as such partners, agreed to purchase, and did purchase the same of her, the said administratrix, at and for the price of five thousand dollars, it being in said agreement understood and stipulated that the plaintiff should, and she did, make delivery of the said saw-mill to the said purchasers on or about the first day of January, 1866, and thereupon, if they should so require, that the plaintiff should make application to the said ordinary and court of ordinary for an order to sell, and thereunder should make sale of the said saw-mill to them by public sale through public outcry in the said county of Thomas, in conformity with the laws of the said State of Georgia; it being further understood and stipulated that they, the said purchasers, or some one or more of them, or some one duly authorized to act for them in that behalf, should be present and bid off the said bargained and purchased property at such public sale through public outcry, in order to the completing and perfecting of the title of said property in them, in conformity with the laws of the said State of Georgia; that the said purchasers did so require, and thereupon the plaintiff, as such administratrix, relying upon the representations, the agreement and stipulations aforesaid, did make application and obtained from the said ordinary and court of ordinary the order aforesaid duly made and given, authorizing the plaintiff, as such administratrix aforesaid, to sell said saw-mill, including said tools, implements, and machinery, at public sale through public outcry; and so relying upon the representations, the agreement, and stipulations aforesaid, the plaintiff went to the said State of Georgia and caused due and public notice of said sale to be given of the time and place when and where the same would be made, to wit, at the then late residence of the plaintiff's said intestate, known as his steam saw-mill place, in the county of Clinch, in the State of Georgia aforesaid, on the 30th day of April, 1866; at which time and place, pursuant to such notice and the said order, and in conformity with the laws of the said State of Georgia, the said saw-mill, including said tools, implements, and machinery, were duly sold at public sale, through public outcry, and the said Porter, Poole, and Norwood, as such partners and purchasers aforesaid, and pursuant to their aforesaid agreement and stipulation, 28 were, by one of said partners, present and became the highest bidders for said property, to whom the same was then and there

knocked off at and for the price of five thousand dollars; whereupon, as the plaintiff avers, their title to said property, upon the sale thereof to them so negotiated and completed as aforesaid, became and was, under the laws of the said State of Georgia, completed and fully perfected, the plaintiff thereupon again giving and ratifying full possession of said property to them, said Porter, Poole, and Norwood, as such partners and purchasers thereof under the negotiations and sale or sales aforesaid.

And they, as such partners and purchasers, thereupon took, accepted, and entered into full possession of said property under such purchase, and used and applied the same to the business and purposes of their said partnership; whereby they, as such partners, then became justly indebted to the plaintiff as administratrix in the said sum of five thousand dollars, which, although then and afterwards the plaintiff often demanded, they, said partners and purchasers, have never paid, but still remain justly indebted to the plaintiff, as such administratrix aforesaid, therefor, together with interest thereon from the 30th day of April, 1866.

That afterwards, and on or about the 3d day of June, 1871, the said Jennie L. Graves, the plaintiff, ceased to be a citizen in the said State of Georgia, and became a citizen and an inhabitant in Taylor, in the county of Cortland and State of New York aforesaid, and being such administratrix aforesaid, and the said indebtedness accruing to her as such still continuing, she made due application to the county judge and surrogate of the said county of Cortland, and thereupon the said county judge and surrogate having full power and authority under the laws of the said State of New York so to do, duly appointed her, the said plaintiff, administratrix of all and singular the goods, chattels, and credits of the said Cyrus Graves, deceased, within the said last-mentioned county and State; under which said last-mentioned appointment the plaintiff then and there duly qualified, and letters of administration thereunder duly issued to her as such administratrix as last aforesaid, whereby she became fully qualified and authorized as such, before the commencement of this action; which said letters of administration so issued by the said county judge and surrogate, bearing date the day and year last aforesaid, also the said letters of administration so issued by the said ordinary and court of ordinary, bearing date on or about the 3d day of November, 1862, and also the said order of the said ordinary or court of ordinary, bearing date on or about the 5th day of March, 1866, the plaintiff hereby offers to bring, and will bring, into court and make open proof thereof upon the trial of this action.

Wherefore the plaintiff charges and alleges that, for the cause of action and by reason of the premises hereinabove set forth, the said William T. Porter and J. Morton Poole, and W. G. Norwood, as such partners as aforesaid, became and still are justly indebted to the plaintiff, as such administratrix as aforesaid, in the sum of five thousand dollars, with interest from the 30th day of April, 1866; for which sum and interest the plaintiff, as such administratrix, demands judgment

28½ against the defendants and against the said Porter, impleaded as aforesaid, together with her cost and disbursements in this action.

M. GOODRICH,

Attorney for Plaintiff.

STATE OF NEW YORK,

Tompkins County, ss :

Jennie L. Graves, being duly sworn, says that she is the plaintiff named in the foregoing amended complaint or declaration ; that she has heard the same read and knows the contents thereof ; that the same is true of her own knowledge except as to the matters stated on information and belief, and as to those matters she believes it to be true.

JENNIE L. GRAVES.

Subscribed and sworn, March 15th, 1873, before me.

CHAS. L. THOMAS,

U. S. Com'r.

Circuit court of the United States for the northern district of New York, of October term, 1872, to wit, of March 31st, 1873.

JENNIE L. GRAVES, ADMINISTRATRIX, &C., OF	}
Cyrus Graves, deceased,	
<i>against</i>	
WILLIAM T. PORTER, IMPL'D WITH J. MORTON	}
Poole and W. G. Norwood.	

The defendant William T. Porter, by Scudder and Carter, his attorneys, for answer to the complaint of the plaintiff, admits that the plaintiff was and still is a citizen of the State of New York, and that the defendants are not and were not citizens of said State, and that the defendant Porter is and was a citizen of the State of Delaware, and the said J. Morton Poole is and was a citizen of the State of Delaware, and the defendant Norwood is and was a citizen of the State of North Carolina.

And defendant, further answering, says that he has no knowledge nor information sufficient to form a belief as to whether Cyrus Graves was the husband of the plaintiff, or whether he died intestate, or at the time mentioned in the complaint, or was a citizen of the State of Georgia, or left personal property therein, or whether the plaintiff at any time resided therein, or was duly or at all appointed administratrix
29 of the goods, chattels, and credits of said Cyrus Graves, or whether letters of administration were granted and issued to the plaintiff, or whether the plaintiff qualified as administratrix, and the defendant leaves the plaintiff to the proof of all the allegations in that behalf in the complaint contained.

And defendant admits that a certain saw-mill, with machinery and appliances for the sawing and manufacture of lumber, stood on certain land at or near Homerville, in Clinch County, in the State of Georgia, but has no knowledge or information sufficient to form a belief as to whether it was erected by the said Cyrus Graves, or on whose lands, or under what agreement, or how long the same was to stand, or whether it was or was to continue to be the personal property of said Cyrus Graves, or when it ceased to be employed as a saw-mill, and leaves the plaintiff to make proof thereof.

And defendant admits that he and the defendants, Poole & Norwood, were interested together in the business of sawing and manufacturing lumber at the time mentioned in the complaint, and contemplated and intended to procure, by lease or purchase, or erect
29½ a saw-mill in the neighborhood of Homerville aforesaid, but said defendant denies that the defendants, or either of them, applied to the plaintiff

to purchase the saw-mill described in the complaint and alleged to have been the personal property of said Cyrus Graves in his lifetime, or to buy any personal property.

And defendant alleges that certain real property, with the improvements thereon, consisting of a saw-mill and its machinery and appliances, which the plaintiff represented to them she could convey, was the subject of negotiations between them, and that the defendants discovered that the same did not belong to and could not be conveyed by the plaintiff to them. And defendant denies that the plaintiff bargained and sold, or delivered to the defendants, or either of them, or that the said defendants purchased or took and received of the plaintiff 30 the saw-mill and buildings mentioned in the complaint, or the machinery, tools, and implements, or any or either of them; and the said defendant denies that the defendants, or either of them, promised to pay to the plaintiff the price or sum of five thousand dollars, or any other sum whatever; and the said defendant denies that the plaintiff delivered said saw-mill to the defendants, or any other property or thing, or that the defendants took or accepted or used the said saw-mill as or for their property; and the defendant denies that the defendants, or either of them, are indebted to the plaintiff in any sum whatever.

And defendant denies that the plaintiff had any authority to contract with defendant in reference to said saw-mill in the form or under the circumstances alleged in the complaint, and alleges that by the laws of the State of Georgia in force at the time of the alleged agreement the administrator of an intestate estate was required to make all sales of the personal property of such intestate at public outcry.

30½ And defendant denies that the defendants, or either of them, requested or required the plaintiff to procure the order to sell alleged in the complaint, or that the plaintiff did procure such order, or that the said ordinary had any power or jurisdiction to make the same; and the defendant denies that the defendants, or either of them, agreed to become the purchasers of said property at such alleged sale, or that they did become such purchasers, or that they took or accepted possession thereof under any purchase thereof; and the defendant denies that under the laws of the said State of Georgia the plaintiff had authority to make the agreement alleged in the complaint; and defendant alleges that the said alleged contract was contrary to said laws and void.

And the defendants deny that the county judge and surrogate of Courtland County had jurisdiction to appoint the plaintiff administratrix as alleged in the complaint.

And defendant denies each and every allegation of the complaint not herein specifically admitted or denied.

SCUDDER & CARTER,
Def'ts' Att'ys.

31 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

William S. Porter, being duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that the foregoing answer is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters he believes it to be true.

W. S. PORTER.

Sworn to before me this 31st day of March, 1873.

[L. S.]

SAMUEL SAYLER,
Notary Public.

32 The cause was first tried before the Hon. Wm. J. Wallace, district judge of the northern district of New York, at a circuit court held at the city of Albany, on the 14th day of October, 1876, and a verdict rendered for the plaintiff, which verdict, on defendant's motion for a new trial, was set aside and a new trial ordered, May 19th, 1877; and the cause was tried again at a circuit court held at the village of Canandaigua on the 22d, 23d, 25th, and 26th days of June, 1877, before the Hon. Hoyt H. Wheeler, district judge of the United States for the district of Vermont, and a jury.

To maintain the issues on her part the plaintiff read in evidence the following letter (produced by the defendant):

Six letters from J. Morton Poole & Co. to plaintiff, all dated at Wilmington, Delaware—one, Dec. 1st, 1865; another, Dec. 11th, 1865; another, Dec. 21st, 1865; another, Jan. 1st, 1866; another, Jan. 15th, 1866; another, Feb. 15th, 1866. And also six letters from plaintiff to J. Morton Poole & Co., all dated at Cincinnati, Cortland Co., N. Y.—one Dec. 13th, 1865; another, Dec. 26th, 1865; another, Dec. (no day or year); another, Jan. 8th, 1866; another, Feb. 12th, 1866; and another, Feb. 26th, 1866.

WILMINGTON, Dec. 1st, 1865.

Mrs. JENNIE L. GRAVES,
Cincinnati, Cleveland Co., New York:

MADAM: We have a letter from our friend, W. G. Norwood, the present tenant of your saw-mill at Station No. 11, on the line of the A. and G. R. R., Clinch County, Ga., requesting us to either see you or ascertain by correspondence the terms on which you will renew to him the lease of said mill, which he now holds by assignment from Messrs. Lovel and Latimore, the former tenants. Mr. Norwood states that your agent in Georgia, whom you directed him to see respecting this lease, is deceased, and the difficulty of maintaining a correspondence with a part of the country in which the U. S. mails have not yet been established is his reason for asking us to act for him. May we hear from you, stating your terms, etc., and oblige,

Yours, truly,

J. MORTON POOLE & CO.,
Per A.

WILMINGTON, DELAWARE,
December 11th, 1865.

Mrs. JENNIE L. GRAVES,
Cincinnati, Cortland Co., New York:

MADAM: We wrote you on the first day of this month, directed to Cleveland Co., New York, and not receiving a reply, upon enquiry, find we were in error in the address, that it should have been Cortland Co. Our letter was as follows: "We have a letter from our friend, W. G. Norwood, the present tenant of your saw-mill, at Station No. 11, on the line of the A. and G. R. R., Clinch Co., Georgia, requesting us to either see you or ascertain by correspondence the terms on which you will renew to him the lease of said mill, which he now holds by assignment from Mrs. Lovel & Latimore, the former tenants. Mr. Norwood states that your agent in Georgia, whom you directed him to see respecting this lease, is deceased; and the difficulty of maintaining a correspondence with a part of the country in which the U. S. mails have not yet

been re-established is his reason for asking us to act for him. May we hear from you respecting it, stating your terms, &c., and oblige,

"Yours, truly,

"J. MORTON POOLE & CO."

33

CINCINNATUS, CORTLAND Co., N. Y.,
Dec. 13th, 1865.

Messrs. J. MORTON POOLE & Co.,
Wilmington, N. C. :

GENTLEMEN: Yours in reference to Mr. W. G. Norwood was duly received. I delayed writing, hoping to hear personally from him in reply to what I had already written; i. e., that I prefer selling the mill in question. I have offered it for \$5,000 (five thousand dollars), possession to be given on the 1st January, 1866. Payment in full the day of sale, or good responsible names. I suppose Messrs. Lovell & Latimer have injured the mill, but they are responsible for all unnecessary or unnatural wear of the property. The mill is for sale for the amount mentioned to any responsible person or parties. I hope for an immediate answer from Mr. Norwood. Should you know persons wishing to buy, please refer them to this property, giving them my address, and oblige.

Very respectfully, yours,

JENNIE LOUISA GRAVES.

P. S.—What are the railroad facilities below Richmond, through your State and S. Carolina.

WILMINGTON, DELAWARE,
Dec. 21st, 1865.

Mrs. JENNIE L. GRAVES,
Cincinnati, Cortland Co., N. Y.:

MADAM: After long delay, we have your favor of the 13th inst., in reply to ours of the 1st, in which you decline to lease this mill, but offer to sell it for \$5,000. From not receiving a reply promptly, we were led to infer that our letter had not come to hand, through our not having your proper address, and accordingly thought best to send a person to seek you out and confer personally with you respecting the matter put into our hands by our friend W. G. Norwood. Your letter, addressed to us by the hands of this person, Mr. Pusey, "in which you offer to" sell us the mill at No. 11, A. & G. R. R., for \$5,000, or rent it at the rate of \$150 per month, for such time as you may find it to your advantage to do so, and that you should require a bond for the full value of the mill, if rented, provided it should be destroyed; that is, if you find responsible parties.

The price and conditions you attached to a lease of the mill cannot for a moment be entertained, and we suppose these unusual conditions are exacted from your determination not to lease the mill at all but make sale of it. We have no authority from Mr. Norwood to purchase the property, but think we can obtain power from him to treat with you for its purchase, and would ask you to write us, giving us the refusal till such time as we can write him and hear from him in reply. Mr. Norwood, we are confident, will be governed by our advice, and our council to him will be decidedly to purchase the property, and if he acquiesces with us, we will guarantee the money to you. In the mean time, in anticipation of this result, we would

like to be informed what it is that you own at Station No. 11, A. & G. R. R.

Is the mill on your land, and if so, how much land have you; or if not on your land, what lien have you on it; also is there a house or houses on the land? We do not think your price unreasonable, and though Mr. Norwood is a partner and must be consulted, we say now, as Mr. Pusey said to you personally, that we are the responsible parties in the concern, and control all the decisions.

We also understand from him that you have proposed to or would accede to a proposition from Messrs. Lovell and Lattimore to pay you \$5,000 for the property and release them from any claim you may have on them for rent, &c., in arrear. Though we do not consider Messrs. L. & L. desirable men to deal with, we should expect if we purchase the property in addition to a transfer of the property you transfer to us your claims on them. We should expect this, not with the hope of collecting it out of them, but to control them in an unsettled matter, wherein Mr. Norwood thought he also had, as you seem to think you have been, wronged by them.

Please inform us how you hold this property, if in fee, and from whom you derived it. If from your deceased husband, do you hold it by will, or was he intestate? This information we should have so that we may know that we get a good title in exchange for our money. In answer to your P. S. enquiring what are the railroad facilities for getting south, we would say that our Mr. Poole has just returned from an extended journey through the Southern States, and that he found it, from the destroyed railroads and bridges, a very arduous, hazardous, and expensive undertaking, such as no lady should undertake. If you do go take this city in your route, and you can learn our standing and responsibility.

Yours truly,

J. MORTON POOLE & CO.

CINCINNATUS, N. Y.,

Dec. 26th, 1865.

Messrs. J. MORTON POOLE & Co.,
Wilmington, Del.:

GENTLEMEN: Yours of the 21st came to hand yesterday. The day Mr. Pusey was here I had a letter from my friends in Georgia, asking for me to come there immediately to the settlement of my father's estate. A friend of mine had just reached there from N. Y. via Cincinnati and Nashville; found no difficulty. This is a longer route, but I like it best. I shall go right away and will write you from some point in Georgia, if Providence gives me a safe journey.

The title is unquestionable. I am the administratrix on my husband's estate, and Mr. Graves was the sole possessor of the property in question.

I prefer arranging the matter with Messrs. Lovell and Lattimer rather than to assign to you. How true "there is policy in war," and how much policy in business.

34 Gentlemen, the more I am called upon to do with the children of this world the more need I see of a "Saviour's pardoning power, and of an eye keen to see to securing our own effects lest we may cry we are "naked and none to clothe," "hungry and none to feed."

I shall not have time to hear again from you before I leave. Will add you can run the mill from the words you had from me by the hands

of Mr. Pusey, until I advise you from the mill, or via your agent in Georgia.

When Mr. Pusey was here I thought if I could sell the mill I, perhaps, would not have to go South until fall, but have had two urgent calls since I saw him to come immediately. As I have to go I will arrange the business through your agent there, or immediately after my return North, which will be some time in February. Hoping this will be satisfactory to you, I remain,

Very respectfully yours,

JENNIE LOUISA GRAVES.

P. S.—From where I marked "some wanting," I ought to have said until you are further advised. I may never reach there and might never hear from me.

CINCINNATUS, CORTLAND CO., N. Y., Dec.

Messrs. J. MORTON POOLE & Co.,
Wilmington, Del.:

GENTLEMEN: I wrote you on receipt of yours, stating that I should leave for Georgia immediately, but sickness in my family will prevent my going this week; have concluded to go via steamer from New York to Sav.; want to sail a week from the ensuing Saturday, but all depends on the children's health.

Should I go, I will stop at the Merchant's Hotel, Courtland street; should you be in N. Y. at this time it would be pleasant for me to meet you and talk the business over; however, I will not in anywise retract what I have said to you. Send me a draft on New York for \$5,000 (five thousand dollars), and I will give you a good title for the mill. Before I received your last I wrote Col. McIntyre, my counsel in Georgia, telling him to sell the mill for me. Mr. Pusey said he could not say anything about buying the mill, as he was not authorized. However, the matter is before you and no one but me can give a title; there will be no difficulty on acct of my asking "Col." to help me in disposing of the property. I had one cart and mill tools, a new house where the "foreman" has lived while employed by Messrs. L. & L.; with the house is one acre of land.

Our house was, perhaps, the best in the place, save the "hotel;" makes a very good home for a small family. These I will sell you reasonably.

Should you conclude to buy write me immediately and I will advise the "Col." accordingly, and there will be no disappointment with other parties. I probably shall be here a week longer; leave here on Thursday of next week for N. Y. if my family are well; perhaps
34½ you had better come here to arrange the papers, or would you do this by express?

Very truly yours,

JENNIE LOUISA GRAVES.

P. S.—Please give me an immediate reply—I want to know your conclusion before I go away.

Yours,

J. L. G.

WILMINGTON, DELAWARE, Jan. 1st, 1866.

Mrs. JENNIE LOUISA GRAVES,
Cincinnati, Cortland Co., New York:

MADAM: We are in receipt of a letter from you without date, but

written since the one that informed us you were about starting for Georgia, and that you would complete the arrangement begun between you and us with Mr. Norwood on the spot. You now inform us that in consequence of sickness in your family you have deferred going for a short time, and that if the health of your children permits you will sail from New York for Savannah on Saturday next; that if you do go, you will stop at the Merchant's Hotel in Cortland street, and that you desire to meet us to talk it over. Your being in New York City at short times you make depend upon the contingency of your children's health, and on that uncertainty it would hardly be worth our while to go there unless we were certain of meeting you. But this we will say, if you telegraph us at your departure from home there will be time enough for us to receive it and get there as soon as you. If you will do this we will get Mr. Pusey to meet you and have the talk you desire. He will have full authority to act, and whatever he may engage to do we will bind ourselves to carry out. You should bring with you, to show him, your title deeds to the land, and a certificate from the county of your appointment as administratrix.

Yours truly,

J. MORTON POOLE & CO.

CINCINNATUS, CORTLAND CO., N. Y.,
January 8, 1866.

Messrs. J. MORTON POOLE & Co.,

Wilmington, Del. : •

GENTLEMEN: Yours of the 1st inst. came to hand on the 6th, to which I reply. I came through the lines during the rebellion, when we were not allowed to bring papers of any kind. I could sell you the mill and mill property, i. e. the house and lot, cart and whatever tools, &c., that belonged to the mill, for the sum of \$5,500 (five thousand and five hundred dollars), this to be assigned to you on the receipt of the above sum from your hands, to be paid in national currency. I shall
35 have to make returns to the ordinary of Thomas Co., Georgia, and he will receipt the same and charge it to me, to be paid to my heirs. This is the way I have perfected all sales since Mr. Graves' death. I conclude from yours written after Mr. Pusey's return to your place, that you are willing and ready to pay the price I named for the mill, but I would like to make a full sale and have added the house, &c., which you must need with the mill, for the small additional figures. Here I will add, I will wait or defer going South, say 10 days, to give you time to write me, or to come and complete this bargain. I think an assignment of this, acknowledged before judge or justice, will give you full possession. So I am informed. When I go South I will have Judge Tooke, of Thomas County, give you full assurance that I took from his hands letters of admini's on my husband's estate. I should have advertised before this, but the sale with you was contemplated and I have waited, and will, as I before stated, give you time to write or come and finish this business. My children are improving, but the extreme cold weather, and fearing a relapse, I thought best to wait a little while longer. I shall endeavor when I leave to reach New York the day of sailing, and so make no delay or expense in the city. I am glad Mr. Pusey did not expect to meet me. The note you had without date was a hasty one, but I thought best to inform you that I should not go as I had anticipated. Write me immediately on receipt of this how we shall conclude this arrangement. I could make this assignment and send you

after receiving a draft on New York for the sum mentioned (and the cashier of our bank could act as your attorney). This you can arrange. Should you come you will do much better to come up to Cortland. You will be well cared for at the Messenger House. I hope to hear from you or see you as soon as possible after this reaches you. You might write, say, two days before your coming, and I will be ready to meet you.

Very respectfully yours,

JENNIE LOUISA GRAVES.

WILMINGTON, *January 15th, 1865.*

Mrs. JENNIE LOUISA GRAVES,

Cincinnati, Cortland Co., New York :

MADAME: Your favor of the 8th inst. at hand, and contents noted. In offering to give you \$5,000 for the mill property at Station No. 11, A. & G. R. R., we supposing we were buying the whole property, mill, house, land, &c., your whole interest at the place, and were surprised to learn from your last two letters that we had misunderstood your offer, that it was the saw-mill alone that you intended to sell for \$5,000, and require \$500 more for the necessary appendages to the saw mill. This is a misunderstanding. We never contemplated that the price you mentioned did not include your whole interest at that place, and are not

prepared to accede to what we consider your increased demand.
35½ We are prepared to give you \$5,000 for your whole interest at that place when we are satisfied that you can give us a clear title to the property in exchange for our money, and to pay you the interest on this sum from the 1st of this month till the deeds are handed to us.

We know nothing about the administration law of Georgia, and you say you have no papers with you to show that you have taken administration on your husband's estate. The laws of Georgia may not permit you to sell this property; there may be many things that will prevent you making a good title to the mill, dwelling, &c., that we, in the present state of our knowledge, know nothing about, and we cannot be expected to part with our money in this uncertainty. As soon as we are assured that you can give us a good title we will pay the money. As you propose going to Georgia, we would propose that you lay the evidence of your right to dispose of this property before our friend W. S. Bassinger, attorney-at-law in Savannah, and upon your satisfying him that all is right, he will give you a draft on us for the amount, or the payment may be arranged in any other way you may prefer. It is right and necessary that we are assured that the property is ours when we have paid for it.

Yours truly,

J. MORTON POOLE & CO.

CINCINNATUS, NEW-YORK,

February 12th, 1866.

MESSRS. J. MORTON POOLE & Co.,

Wilmington, Del.:

GENTLEMEN: Yours of the 15th Jan. was received. I defer'd writing, hoping my sister, in Georgia, would send me the letters of administration you would like to see before buying my property. I have waited anxiously, but as yet they have not come; they may consider the mails as yet too unsafe to send such papers by. However, I took letters, and they are in the house of my father-in-law there.

Rest assured I would never dare such an act as to sell property that

was not in my own name. Your claim shall be a perfect one; the judge marked it "all private property," "personal property," subject to sale. Now it is offered to you, the mill as I have told you. I can't see why you should suppose the house included. I did not say so to Mr. Pusey nor to you. "The mill for \$5,000." The house for \$500, and the rent, as I said to you, for days up the possession is given. Mr. Graves' former partner went as far as New York, on his way to Georgia, to look at the property in question, but I told him I considered it sold to you.

I hope to receive a draft on New York for the figures mentioned, and the property in question is yours. I hope the letters may come, but you may never fear the mill is mine; there is no incumbrance, and if your papers are not right I am liable for law and damage.

Other parties are anxious for this property—a firm in Baltimore; parties in the South. I tell all it is yours on receipt of the full amount of figures, including rent up to the time possession is given, 36 which will be immediately on receiving from you the price I ask for this property. A bill of sale is all the papers I need, for it is personal property, for the benefit of the widow and heirs of Cyrus Graves, to be used by Mrs. Graves for her and her children's sustenance and need. Let us have this closed. Send an agent, or any way you may deem proper, and you will learn what I say; it is true, that I am the person "sworn to attend to the estate."

Write, or come, for this is a long lapse for selling one mill. You need not fear. I have wrote to the judge, and presume some of my letters will bring these letters; yet they are no account only to show I do not make false pretences, which but few have ever dared to do.

Very respectfully,

JENNIE LOUISA GRAVES.

P. S.—This is written in haste. I have given up going South for the present.

JENNIE LOUISA GRAVES.

WILMINGTON, *February 15th, 1866.*

Mrs. JENNIE LOUISA GRAVES,

Cincinnati, Cortland Co., New York :

MADAM : We have your favor of the 12th inst. before us, and have given its contents due consideration. We never doubted your having been appointed administratrix of your husband's estate, and gave full faith to your assertion that you had legal authority to act in that capacity; but as we said in a former letter, we knew nothing of the administration of Georgia; that there might be some form of procedure under those laws which you would be required to follow in making a good conveyance of the property, which, if not followed, would impair the validity of the title, hence our suggestions, as you then proposed to go to Savannah, that you should lay the evidence of your authority to dispose of this property before Mr. Bassinger, our attorney in that city, who was familiar with the laws of Georgia, and upon satisfying him that you could make a conveyance good in law, he would make arrangements for payment.

Our offer to you to purchase this property has always been conditioned upon your ability to make a good conveyance, and we may say that, since last writing to you, we have received information that fully justifies us in the prudent course we had resolved to pursue, and which shows how unwise it would have been in us to have complied without communication with your wishes, that we should pay the purchase

money now, and you would afterwards satisfy us in regard to your right to sell. The assurances in your last letter that the mill is yours, that there is no incumbrance on it, and if the papers are not right you are liable in law for damages, would scarcely justify a prudent man in involving himself in a lawsuit, and we may say are not borne out by the information we have received.

36½ Upon a statement of all the facts in connection with this property to our counsel we are advised that the title is not in you, and that you cannot legally convey it, hence our offer to purchase becomes void.

We are informed that your husband, in connection with Dr. Mattox, erected this mill on the land of the latter; that the Dr. afterwards sold your husband his interest, with permission to occupy the land; that Mattox then sold the land to a man named Livingston, taking a mortgage from him to secure the unpaid portion of the purchase money. If we are correctly informed, the above statement shows that the title to this property is in Livingston, not in you, as the representative of your husband, and that you cannot convey it. This is an entanglement that would necessarily have to be removed before we become the purchasers.

There are other objections equally fatal affecting any conveyance you might make, that we do not think at present necessary to mention, that would also have to be removed before we purchase.

Yours, truly,

J. MORTON POOLE & CO.

CINCINNATUS, NEW YORK.

Feb. 26th, 1866.

J. MORTON POOLE & Co.,

Wilmington, Del. :

GENTLEMEN: Yours was received and contents noticed. You speak of the sale between Messrs. Mattox & Livingston; this had nothing to do whatever with Mr. Graves' business. Mattox had no interest in the mill; the partnership was this: The mill belonged solely to Mr. Graves, and the land and timber to Mr. Mattox. So it was the mill against the timber, each bearing half the expenses and having half the proceeds. I knew of the sale of the land, but that did not effect or have any connection with the mill that belonged to Mr. Graves as "portable personal property." I am very much disappointed in your now offering "fatal reasons" when you have said that you were ready to take the mill when you knew I had authority to convey it legally to another party.

Gentlemen, I should be glad to sell you this property; this you know. My health is poor. My children are very frail, and I need for them all I can save of the wreck the war has left me. I will say this: I shall be in New York on next Saturday, until three o'clock, at Merchant's Hotel, 41 Cortland street; would be glad to meet you there, and then I could tell you just how the matter is; but again I say the mill is yours for the amount I have mentioned to you, with a full assurance that no trouble shall ever arise from the sale; there are no heirs except the two little ones besides me. I hope I shall see you in New York, and that you will do me the favor to fulfil your word.

Had I not depended on your purchase the mill would have been sold.

37 Hoping you will come to New York and there arrange for the property, I subscribe myself,

Very respectfully, yours,

JENNIE LOUISA GRAVES.

Plaintiff then read the deposition of HENRY H. TOOKE, taken under notice and examined as a witness on her behalf at Thomasville, in the State of Georgia, on the 21st and other days in August, 1873, both parties being represented by counsel upon the examination. The witness testified :

I reside in Thomasville, and am the ordinary of Thomas County, Georgia, and have been since 1852.

I am acquainted with Mrs. Graves, and was acquainted with her husband in his lifetime. They resided in this county at the time of his death, in 1862; after his death the widow and plaintiff applied to me for administration upon his estate.

Plaintiff duly proved by record evidence her appointment, in Thomas Co., Georgia, as administratrix of the estate of her husband, Cyrus Graves, deceased, on November 3d, 1862, and that letters of administration in due form then issued to her, which were given in evidence. All which, together with her due appointment there, being conceded by defendant, is not here set out any further.

Witness continues : Mrs. Graves was absent from here a year or two during the war; when she left she said she was going North.

Q. Did Mrs. Graves at any time make application for an order by you as ordinary for selling a saw-mill belonging to the estate of her deceased husband ?

She did; the order was granted; the application and order appear of record in my office.

Witness produces certified copy of the record of the same, which was given in evidence, and read as follows :

STATE OF GEORGIA,

Thomas County:

To the hon. court of ordinary of said county:

The undersigned, administratrix on the estate of Cyrus S. Graves, deceased, sheweth that said deceased died possessed of an estate, a portion of which is of a perishable nature and kind, to wit, a steam saw-mill, boilers and fixtures thereto, which was, at the time of the death of said deceased, and is now, in the county of Clinch and State aforesaid; that petitioner believes it would be to the best interest of said estate to sell said mill, boilers, and fixtures, and that the same can be done without delay at private sale, and for a fair price and valuation. Said administratrix therefore asks and prays for an order from said court authorizing her to sell said mill, boilers, and fixtures, either at private or public sale, as she may deem best for the interest of said estate, and as in duty bound, will ever pray, etc.

JENNIE L. GRAVES, *Adm'x.*

37½ STATE OF GEORGIA,

Thomas County:

Court of ordinary, March 5th, regular term, 1876.

Whereas, Jennie L. Graves, administratrix on the estate of Cyrus S. Graves, deceased, having made application by petition to this court for an order of said court, authorizing her, as administratrix as aforesaid, to sell the steam saw-mill, boiler and fixtures connected thereto, the property of said deceased, in Clinch County, and State aforesaid, either at public or private sale, as said administratrix may deem best for the in-

terest of said estate, and having represented to said court that the same could be sold by her as such administratrix at private sale, for a fair price and valuation therefor; it is therefore, upon due consideration of the premises, ordered and adjudged by the court, that said Jennie L. Graves, as administratrix as aforesaid, be, and she is, authorized to sell said mill, boilers and fixtures thereto, either at private or public sale, as she may deem best for the interest of said estate, and that the proceeds of said sale be by said administratrix invested in real estate and lands, at a fair valuation for the same, for the use and benefit of the heirs and distributees of said estate; and it is further ordered by the court that said administratrix report her actings and doings in the premises to this court, to become a matter of record therein, as the law directs, in such case made and provided; and if sold at public sale, ten days' notice thereof be first given in terms of the requirement of the law in such case made and provided.

H. H. TOOKE, *Ordinary*.

(Said copy order and petition being duly certified under seal of court.)

Witness continued:

Shortly after the date of the order the plaintiff called on me, representing that she desired to sell the steam mill and fixtures; she requested me to prepare notices and have them posted for a sale of the mill by public outcry. I first explained to her what was necessary to be done for such a sale.

I prepared notices for a sale by public outcry, writing them with my own hand.

The following question was then asked the witness:

Q. Did any one other than the plaintiff, about the time that she applied for the order and notices for the sale by public outcry, come to you and make application or request that such order and notices be given and such sale by public outcry be had? If yea, state who that person was, and whether he called upon you before or after the notices for such sale by public outcry were given.

(To which question the defendants' counsel objected as improper, and not calling for or naming any individual connected with the defendants.

The objection was overruled, and defendants excepted.)

38 A. A gentleman called upon me on or about that time at my office. I think he was here one day and she the next, or else she called on the same day after he had called. I was not acquainted with him. He said his name was Norwood. We had a good deal of talk as regards the sale of the mill. He spoke about a firm. He said he had been advised to have a public sale of the mill, as is usual here. He had been advised by some lawyer in Savannah, perhaps by the name of Bassinger. I am not certain that was the name. He desired to have a legal sale of it, and that notices be given. I told him that should be done, and they were given. Plaintiff called before the order was made and the notices given, and made the same request, as I have already stated. The man came in and told me his name was Norwood. He talked that he was one of the persons interested in the purchase of the mill. He mentioned the firm name, and I put in the notices the name of that firm.

Q. State whether you made the order and drew the notices?

A. I drew three notices and sent them to Homerville to be posted there where the mill was.

A paper was here shown witness, and said: That is one of the notices which I drew.

The notice was read in evidence, as follows:

Notice.

STATE OF GEORGIA,
Thomas County:

Agreeable to an order of the hon. court of ordinary of Thomas County, the undersigned will sell on Monday, the 30th day of April, instant, at the residence of Cyrus S. Graves, deceased, known as his steam-mill place, in Clinch County, State aforesaid, the steam mill and fixtures thereto, the property of said deceased; sale to perfect a title to the same to J. Morton Poole & Co., under and in accordance with the terms of a private sale made to and with them for said property.

April 16th, 1866.

JENNIE L. GRAVES,
Administratrix.

(There being on the back of said written notice appearances indicating that the same had been posted.)

Witness continued:

The following question was asked the witness by plaintiff's counsel:

Q. Do you know if any one, and, if any one, who, was authorized and directed by the plaintiff to attend at the time and place mentioned in the notice and make sale of the mill?

38½ (Defendant's counsel objected to the question as incompetent. The objection was overruled by the court, and defendant excepted.)

A. Yes. It was E. O. Thompson, of this place. The distance from Thomasville to Homerville is 100 miles on the Atlantic & Gulf Railroad.

On a cross-examination the witness testified:

I cannot produce from the records of my office the inventory and appraisement of the estate of Cyrus S. Graves. No such inventory and appraisement were ever made and returned to my office, as I remember. I can find but one annual return, which was of the 27th of March, 1866. I was of opinion there was another, but I cannot find it.

Q. Do you know that Mrs. Graves was absent from here during any year of the war?

A. I am satisfied she was, but did not see her outside of the State. From what she told me herself at my office, when she handed me a book with some papers connected with the administration—telling me she was going North; and from not seeing her here for from two to three or one to two years, I was satisfied she was gone. This was during the war.

Q. Did you subsequently to 1863, upon application by plaintiff, pass an order authorizing the renting, either privately or publicly, of the steam saw-mill in question in this suit?

A. I passed some order authorizing Mrs. Graves, administratrix, to rent the mill, publicly or privately, subsequent to 1863. I must have done it, for here it is on the record. I don't say on whose application the orders were made.

The witness produces certified copies of the record of such orders for years 1864 and 1865, which were read in evidence:

GEORGIA,

Thomas County:

Court of ordinary, regular term, January 11th, 1864.

Upon application, it is ordered by the court that Jennie L. Graves, administratrix on the estate of Cyrus S. Graves, be, and she is, authorized to rent for the year 1864 the steam mill and fixtures, the property of said deceased, either publicly or privately, as she may deem best for the interest of said estate, and that she account to this court for the amount of rent received, as the law directs.

H. H. TOOKE, *Ordinary.*

GEORGIA,

Thomas County:

Court of ordinary, January 9th, regular term, 1865.

On application, it is ordered by the court that Jennie L. Graves, administratrix on the estate of Cyrus S. Graves, deceased, be, and she is, authorized to rent for the year 1865 the steam mill and fixtures thereto, the property of said deceased, either publicly or privately, as she may deem best for the interest of said estate, and that she account to this court for the rent received as the law directs.

H. H. TOOKE, *Ordinary.*

WITNESS. There is a record in my office of an application for leave to rent, but by whom made I cannot tell. There were several applications made, but when made I can only tell from my records. There is no written application except the orders themselves.

Q. What is the rule prescribed for all administrator's sales in the State of Georgia?

A. By public outcry.

Q. Do you mean by your answer to the last question that, as the ordinary of Thomas County, Georgia, and charged therein with the administration of the law relating to estates of deceased persons, you then recognized as regular and valid, or that you now recognize as regular and valid, the private sale alleged to have been made of the mill and fixtures prior to and in the absence of any order of sale from you as such ordinary?

A. I don't think I would have recognized it without the order. I don't think it would have been legal without the order. I do not know that drawing the notices of sale were part of my official duty, but I did, for the administratrix, prepare the notices for the sale of the mill and fixtures. I did not state in the notices the terms of sale. All the terms there is in the private sale, to perfect the title to J. Morton Poole & Co., under and in accordance with the terms of a private sale made to them. The notice, I think, followed the order granted.

It is the duty of an administrator under the law of Georgia to render to the court of ordinary an account of the proceeds of sales.

There has been no return of any sale made or filed in my office by the plaintiff.

I do not know that I would know the man calling himself Norwood. I had not seen him before and have not since.

Q. You have stated that this person calling himself "Norwood" had been advised by counsel with a name something like Bassinger; what did he state to you he had been advised to do by this counsel?

The notice was read in evidence, as follows:

Notice.

STATE OF GEORGIA,

Thomas County:

Agreeable to an order of the hon. court of ordinary of Thomas County, the undersigned will sell on Monday, the 30th day of April, instant, at the residence of Cyrus S. Graves, deceased, known as his steam-mill place, in Clinch County, State aforesaid, the steam mill and fixtures thereto, the property of said deceased; sale to perfect a title to the same to J. Morton Poole & Co., under and in accordance with the terms of a private sale made to and with them for said property.

April 16th, 1866.

JENNIE L. GRAVES,

Administratrix.

(There being on the back of said written notice appearances indicating that the same had been posted.)

Witness continued:

The following question was asked the witness by plaintiff's counsel:

Q. Do you know if any one, and, if any one, who, was authorized and directed by the plaintiff to attend at the time and place mentioned in the notice and make sale of the mill?

38½ (Defendant's counsel objected to the question as incompetent.

The objection was overruled by the court, and defendant excepted.)

A. Yes. It was E. O. Thompson, of this place. The distance from Thomasville to Homerville is 100 miles on the Atlantic & Gulf Railroad.

On a cross-examination the witness testified:

I cannot produce from the records of my office the inventory and appraisement of the estate of Cyrus S. Graves. No such inventory and appraisement were ever made and returned to my office, as I remember. I can find but one annual return, which was of the 27th of March, 1866. I was of opinion there was another, but I cannot find it.

Q. Do you know that Mrs. Graves was absent from here during any year of the war?

A. I am satisfied she was, but did not see her outside of the State. From what she told me herself at my office, when she handed me a book with some papers connected with the administration—telling me she was going North; and from not seeing her here for from two to three or one to two years, I was satisfied she was gone. This was during the war.

Q. Did you subsequently to 1863, upon application by plaintiff, pass an order authorizing the renting, either privately or publicly, of the steam saw-mill in question in this suit?

A. I passed some order authorizing Mrs. Graves, administratrix, to rent the mill, publicly or privately, subsequent to 1863. I must have done it, for here it is on the record. I don't say on whose application the orders were made.

The witness produces certified copies of the record of such orders for years 1864 and 1865, which were read in evidence:

GEORGIA,

Thomas County:

Court of ordinary, regular term, January 11th, 1864.

Upon application, it is ordered by the court that Jennie L. Graves, administratrix on the estate of Cyrus S. Graves, be, and she is, authorized to rent for the year 1864 the steam mill and fixtures, the property of said deceased, either publicly or privately, as she may deem best for the interest of said estate, and that she account to this court for the amount of rent received, as the law directs.

H. H. TOOKE, *Ordinary.*

GEORGIA,

Thomas County:

Court of ordinary, January 9th, regular term, 1865.

On application, it is ordered by the court that Jennie L. Graves, administratrix on the estate of Cyrus S. Graves, deceased, be, and she is, authorized to rent for the year 1865 the steam mill and fixtures thereto, the property of said deceased, either publicly or privately, as she may deem best for the interest of said estate, and that she account to this court for the rent received as the law directs.

H. H. TOOKE, *Ordinary.*

WITNESS. There is a record in my office of an application for leave to rent, but by whom made I cannot tell. There were several applications made, but when made I can only tell from my records. There is no written application except the orders themselves.

Q. What is the rule prescribed for all administrator's sales in the State of Georgia?

A. By public outcry.

Q. Do you mean by your answer to the last question that, as the ordinary of Thomas County, Georgia, and charged therein with the administration of the law relating to estates of deceased persons, you then recognized as regular and valid, or that you now recognize as regular and valid, the private sale alleged to have been made of the mill and fixtures prior to and in the absence of any order of sale from you as such ordinary?

A. I don't think I would have recognized it without the order. I don't think it would have been legal without the order. I do not know that drawing the notices of sale were part of my official duty, but I did, for the administratrix, prepare the notices for the sale of the mill and fixtures. I did not state in the notices the terms of sale. All the terms there is in the notices is, to perfect the title to J. Morton Poole & Co., under and in accordance with the terms of a private sale made to them. The notice, I think, followed the order granted.

It is the duty of an administrator under the law of Georgia to render to the court of ordinary an account of the proceeds of sales.

There has been no return of any sale made or filed in my office by the plaintiff.

I do not know that I would know the man calling himself Norwood. I had not seen him before and have not since.

Q. You have stated that this person calling himself "Norwood" had been advised by counsel with a name something like Bassinger; what did he state to you he had been advised to do by this counsel?

A. That was to make the sale under an order and notice at public outcry.

Q. Did you pass said order for sale of mill and fixtures upon the application of the person calling himself Norwood?

A. I think upon the application of Mrs. Graves. He had expressed himself that way in the conversation between me and him. I cannot give the month or day of this interview. It was in 1866, about the time of the order.

Q. Did not the person whom you refer to as "Norwood" tell you at said interview that he had called upon you on the advice of counsel called Bassinger, in order to procure from you such facts and
40 information respecting the administration of Cyrus Graves' estate as would enable said counsel to advise him whether plaintiff could make a proper legal sale of certain property belonging to said estate?

A. I don't remember the precise conversation, but we talked a good deal about this matter while he was there; probably he did.

Q. Did you not at the time of said interview, at the request of the party calling himself Norwood, furnish him or his counsel with an exemplification from the records of your office, showing all the proceedings had in connection with Cyrus S. Graves' estate from the application for letters of administration by plaintiff down to the close of 1865?

A. I do not remember; I may have done so; I have several clerks; they may not have included all that was done in making a copy.

Q. Did you at the time mentioned yourself make and furnish such exemplification?

A. I might have done so, and I might have omitted something myself in giving a full and complete exemplification.

Defendant's counsel here produced to the witness (and likewise produced the same upon trial) an exemplified copy of the record of the court of ordinary of Thomas County, in the matter of the estate of Cyrus S. Graves, deceased, down to the close of 1865, the exemplification of which, by H. H. Tooke, ordinary, bore date January 24th, 1866, and asked witness:

Q. Can you now remember whether in the early part of the year 1866 you furnished a man calling himself Norwood, or his counsel, with the exemplification referred to?

A. I furnished this to somebody; I don't know who; it might have been that man Bassinger; some time in the early part of 1866.

Q. Do you remember now that the business of this man calling himself Norwood, at the interview you have described or referred to, was to procure for his counsel official information in respect to the condition of said estate?

A. I am satisfied since seeing that paper that they wanted information in respect to her appointment.

Redirect examination by plaintiff's counsel:

I delivered the letters of administration to the person known as Jennie L. Graves. The names of Jane L. Graves and Jennie L. Graves are applied to the same person, the plaintiff.

The plaintiff's counsel read the following question from the deposition:

Q. You were asked on the cross-examination whether you considered the private sale of the mill in question as legal, and your answer in substance was, that you did not consider it so without the order which was made. Now, I ask you to state whether with that order and with the

notices given and the sale by public outcry, that was made of the mill, you did or did not consider the sale altogether as proper and legal?

41 (Defendant's counsel objects upon the ground that it implies the existence of a fact which has not been proved, and as calling for the opinion of the witness. Plaintiff's counsel stated that he would prove hereafter that there was a sale at public outcry. Upon such statement the court admitted the evidence. To which ruling defendant's counsel duly excepted.)

A. So far as my official acts are concerned, I considered them legal.

Recross-examination by defendant's counsel:

A willful and continued failure to file annual returns by administrators is good cause for their removal. If there had been a private sale of the mill and fixtures by the plaintiff before the order, I don't know that it would have done much good. In the notices of sale I stated that there had been a private sale.

The plaintiff's counsel then offered in evidence the letters of administration issued to the plaintiff by the surrogate of Cortland County, in the State of New York, dated June 3, 1871, which were received subject to objections by defendant's counsel thereafter to be made. They are as follows:

Letters of administration.

In the matter of the administration of the goods, chattels, and credits of Cyrus S. Graves, deceased.

The people of the State of New York to Jennie L. Graves:

Whereas Cyrus S. Graves, late of the town of _____, in the county of Thomas, in the State of Georgia, deceased, as is alleged, died intestate; having, while living, and at the time of his death, goods, chattels and credits, within this State, and you being entitled thereto, and having first taken and subscribed an oath faithfully and honestly to discharge the duties of such administratrix according to law; and having, with your sureties, executed a bond to us for the faithful performance of those duties, which oath and bond are duly filed in the surrogate's office of our said county of Cortland, we do by these presents depute, constitute and appoint you administratrix of all and singular the goods, chattels and credits which were of the said Cyrus S. Graves, deceased,

42 and do hereby grant unto you, the said Jennie L. Graves, full power by these presents to fully administer upon his personal estate, and to do and perform all duties and acts relating thereto which by the laws of this State are required of administrators appointed by the surrogate, and the performance of which in the administration of the goods, chattels and credits aforesaid may be necessary for the due, faithful and proper administration thereof.

In testimony whereof we have caused the seal of office of our said surrogate to be hereunto affixed.

Witness Abram P. Smith, surrogate of the said county of Cortland, at Cortlandville, this 3d day of June, 1871.

[L. S. SURROGATE'S SEAL,
CORTLAND COUNTY.]

A. P. SMITH, *Surrogate.*

Recorded June 3d, 1871.

A. P. SMITH, *Surrogate.*

The plaintiff's counsel then read from the deposition of Edward O. Thompson, taken on commission at Thomasville, in the State of Georgia, upon written interrogatories, upon the 14th day of September, 1874, which interrogatories, were settled by stipulation between the parties in the following words: "We consent that the direct and cross interrogatories to be administered to the witnesses Seward, Alexander and Thompson be settled, subject to all legal objections to be taken on the trial."

The said EDWARD O. THOMPSON testified:

My age is 38 years; residence, Thomasville, Ga. I am a lumber dealer and contractor. I have known the plaintiff since 1858. I first knew W. G. Norwood seven or eight years ago. I do not know either of the other defendants. The plaintiff's late husband was a brother of my wife. He sometimes wrote his name Cyrus Graves. He died in 1862. He put up one of these portable steam saw mills at Homerville, Clinch Co., Ga., in 1861, and continued to own it from that time until he died. It was placed on land (defendants' counsel in due season objected to the oral evidence of the witness as to the ownership of the land, and plaintiff's counsel stated that he did not claim it as evidence of ownership, and the court instructed the jury that such evidence was not evidence of the title to the land, and in that view allowed the evidence to be read) owned by John H. Mattox, near a large tract of standing pine, suitable for sawing. The only building there was put up for the mill was the mill shed. That was of new material and was well built. It was a structure with no flooring, open at the sides, with a board roof and foundation resting on blocks. All the machinery of the mill, with its outfit of fixtures, Graves bought and shipped from the North ready made. I assisted in putting it in and starting it, and for a week or so running the mill for him.

(In due season the defendant objected to the following answer as irrelevant: "The machinery and its fixtures was full and all new and first quality. The mill was in all respects a first-class portable steam saw mill." The court overruled the objection and defendant excepted.)

I continued to have a general knowledge of it till 1866. I last saw it in April of that year. It was then in good repair.

The plaintiff's counsel read the following question administered to this witness: "What, if anything, do you know of a sale having been made of said steam saw mill with the boilers and fixtures thereto belonging, but exclusive of the site, by the plaintiff or by her authority and direction to the firm of J. Morton Poole & Co., in the latter part of April, 1866? Please state fully what you know of such a sale having been made."

(The defendant's counsel objected to the form of the question, and also that it was incompetent and immaterial, and the answer was not responsive. The court overruled the objection and defendant excepted.)

The answer of the witness was then read.

Ans. I know the plaintiff, in the spring of 1866, came to Thomasville, and, as administratrix of her husband's estate, obtained from the ordinary of Thomas Co. an order and had notices, three or more, drawn by the ordinary and posted in Homerville, for a sale there of the mill in question, at public outcry, on the 30th day of April in that year. I assisted her in obtaining the order, and she employed me to make the sale for her.

(Defendant's counsel objected to the following portion of said answer: "She directed me when I went to make sale of the mill, to call upon

W. G. Norwood, whom I would find at the mill and let him know I had come to make the sale for her, so that he might attend and bid off the property for said purchasers, J. Morton Poole & Co." (The court overruled the objection and defendant excepted.)

I did call upon and so inform said Norwood, when I went to make said sale. I found him at the mill.

(The defendant's counsel specifically objected on like grounds to the following portion of said answer: "He said, in substance, he was expecting some one to come and make the sale." The court overruled the objection and defendant excepted.)

I cannot give his words. I looked about the mill a short time; saw one of the said notices of the sale posted on the mill shed, as I had seen others posted in other parts of Homerville, and at 10 o'clock or a little later, as several other persons than the work hands had gathered there, I called attention to the sale, and stepped out a short distance from the mill shed, followed by said Norwood, and most or all of the other persons. I saw there other than the work hands, and there, on
44 the mill premises, in the presence of these persons (defendant's counsel objects specially on like grounds to the following portion of said answer) I made sale of the mill in question at public outcry (the court overruled the objection and the defendant excepted), between the hours of ten and half-past eleven o'clock in the forenoon of the 30th day of April. What I then offered for sale (defendants' counsel specifically objects to the following portion of said answer) and sold (the court overruled the objection and defendant excepted), was not said mill, with the site it was occupying, but only the mill itself without the site, including the machinery with all its fixtures, the same as owned by said Graves in his lifetime, and then belonging to this estate. So in substance was the statement I made in commencing. In connection with that I read to the persons assembled one of the said notices of the sale which I had taken down, and then had with me, saying I was to sell pursuant to said notice. At first, there was one or more bids of less than \$5,000^{00/100}, each by persons other than said W. G. Norwood; shortly he bid. (Defendant's counsel specifically objected on like grounds to the following portion of said answer:) Understanding the bid made by him for the said firm of J. Morton Poole & Co." (the court overruled the objection, and defendant's counsel excepted), upon his making it, I received and treated it as such by at once announcing it audibly to all, that I was offered (defendant's counsel specifically objected on like grounds to the following portion of said answer) by J. Morton Poole & Co. (the court overruled the objection, and defendant's counsel excepted) for the property to be sold, \$5,000. To my so treating and announcing it, said Norwood, who was near, and within easy hearing distance from me (the defendant's counsel specifically objected on like grounds to the following portion of said answer), neither objected nor dissented to the sale. (The court overruled the objection and defendant's counsel excepted.) Neither did any one object or dissent while I cried the sale. I distinctly cried the bid of five thousand dollars (\$5,000) (defendant's counsel specifically objected on like grounds to the following portion of said answer) as the bid of J. Morton Poole & Co. some two or three times (the court overruled the objection and defendant excepted), stating if no more was bid I should knock the property down to them for that. No more was bid, so I did knock the property down to them (defendant's counsel specifically objected to the following portion of said answer), declaring the same sold to them, said J. Morton Poole & Co.,

for (\$5,000) five thousand dollars (the court overruled the objection and defendant excepted), and that closed the sale. Said Norwood was still present, but thereupon Norwood with the others turned and went away. Norwood went back into the mill, and as he so left without paying said bid, I supposed its payment had been specifically arranged or provided for in the private negotiation between the plaintiff and said purchasers preceding said sale; so I did not ask him for it,

but took the train and returned to Thomasville (defendant's counsel
45 specifically objected on the like grounds to the following portion of said answer), reporting the sale made both to the plaintiff and said ordinary. (The court overruled the objection and defendant excepted.) I have now stated what I know and about all I know of the sale in question, fully and particularly in detail as I recollect it.

In answer to further direct interrogatories, the witness testified :

The one of said notices of sale which I took down at Homerville and had with me and read at the sale, as stated in my preceding answer, I took back with me to Thomasville. Upon the taking of the deposition of the said ordinary, Henry H. Tooke, in this cause, before E. C. Wade, esq., in Thomasville, in August, 1873, that notice was given over, by request, to be annexed to said deposition. I annex hereto (as requested by the interrogatory I am now answering) what I recognize to be a copy.

(The same being annexed to witness' deposition, and in connection therewith read in evidence upon the trial, corresponding, in words and figures, with the notice of sale spoken of by the witness, Henry H. Tooke, and, in connection with his deposition already read, given in evidence upon the trial.)

I was acquainted with all the proceedings preparatory for the sale. I assisted and attended her when she had the notices drawn. Mr. Norwood came to my house, some four miles east of Thomasville, where the plaintiff was stopping.

Cross-examined by defendant's counsel :

The Graves mill was built in 1861; about thirty horse-power; the shed was about sixty feet. The whole cost of the mill was about \$6,000. It was a new mill. Cyrus S. Graves was a brother of my wife. I was present when the mill was built; I assisted in building it for said Graves. I have assisted in putting up other mills, and have owned such mills. Others were present while the mill in question was being put up, among whom was John H. Mattox; he resides at Homerville. Said Graves owned the mill; after his death his widow, the plaintiff, had charge of it. She leased it to Lovell & Lattimore for some two years. I kept a general knowledge of the mill; while I knew of it, J. Morton Poole & Co. occupied it under Norwood's supervision. I was in the mill while they were so occupying it in 1866. There were no foundations to it except those of the mill shed; I did not see these laid or put in. The mill and its fixtures were made or built North; it did not differ from other mills except engine was made with extra large wearing surface, to make it substantial; it had a covering or mill shed of wood, as such mills usually have. The machinery was not connected with the shed, but separate supports placed for it. I was at the mill in April, 1866; at this time J. Morton Poole & Co. were using the mill; it was superintended by W. G. Norwood, who resided at Homerville. I have seen what I recognized to be the Graves mill, or a part of it, since 1866; it was in August, 1873; it was in a dilapidated condition; it was not running. I am not able to state what has become of its machinery; when I saw it last it had been

46 moved to a different place from where Graves placed it. It depends on the quality of the mill, but such a mill, with proper repairs and attention, will last for fifteen to twenty years. There was about an acre of land occupied by the mill and mill yard; it was contiguous to railroad. Homerville is a station on Gulf Railroad. The depot is only a few rods from the mill. There are some thirty or forty other buildings scattered about at Homerville, mostly residences; there are also a court-house and a hotel there. I have twice acted as auctioneer, once at Homerville, on April 30th, 1866. I acted at the request of the plaintiff; she paid me ten dollars for so acting and my expenses.

There were several bids made, but the number I do not now remember. I cannot state the amount of the first one nor that of the next one, nor by whom the bids were made, further than this, that they were made by persons who were strangers to me, and that they were not made by or for J. Morton Poole & Co. I don't remember now the amount of any of the bids made, but I do know that some of them was as much as \$5,000. W. G. Norwood made the last bid. I think I made a memorandum of the sale and gave it to the plaintiff on my return to Thomasville; I can't produce it.

A man of the name of Ivey was at the sale. I cannot name others, but there were some twenty or more present at the sale, mostly strangers to me. At the opening of the sale it was announced by me that the object of the sale to be made was to perfect a prior title to said mill in said J. Morton Poole & Co., which they had acquired by a purchase of the mill of the plaintiff by private agreement for \$5,000, or in substance that. In announcing this I read one of the posted notices of sale. The plaintiff, when she employed me to make the sale, directed me when I went to make it to call on said Norwood, one of the purchasers, whom I would find at the mill, and let him know I had come to make the said sale for her, in order that he might attend and bid off the property for his firm, the said J. Morton Poole & Co. The plaintiff employed me to make this sale, and she gave me these directions verbally some time in April, 1866. As I remember, these directions were given to me in office of the ordinary. I had no written directions from the plaintiff. She gave me a written power of attorney to make the sale for her. This I gave back to the plaintiff on my return to Thomasville. I was sworn and partially examined as a witness for the plaintiff before E. C. Wade, U. S. commissioner, who took the deposition of Tooke in this case. My examination was broken off and abandoned. I was with the plaintiff when she applied to and obtained from the ordinary the order for the sale of the mill in question.

It was in his office. The ordinary was present when plaintiff employed me to make the sale. I asked him some questions how I should proceed to make the sale. In this way and to this extent I did consult him and procure his advice, but not otherwise.

In August, 1873, at Thomasville, in the office of H. Tooke, ordinary, I said, in the presence and hearing of Mr. W. M. Hammond, that the bidding at the sale of the Graves mill was nominal or formal. I never said the sale was a nominal one, or for a nominal sum. When Mr. Goodrich, the plaintiff's counsel, was in Thomasville, in August, 1873,

47 he being a stranger, I went with him and introduced him to persons likely to have knowledge about the property in question. I also suggested some persons likely to know about it. To this extent I acted, and was instrumental in procuring witnesses in the examination in 1873. I know J. R. Alexander, and have known him several years. I have spoken to him about the plaintiff's suit. I have never

formally consulted him about it. My understanding is that the plaintiff and Mr. Goodrich, when in Thomasville, in August, 1873, did consult with said Alexander about the plaintiff's suit. I was not present.

The plaintiff then read the deposition of JOHN R. ALEXANDER (taken under the same commission as the last witness), who testified :

I am 50 years of age; I am a lawyer, and reside at Thomasville, Georgia, and have held the office of judge of the superior court of the northern district of the State for five years ending in 1873. I have known Mrs. Graves about two years. I have knowledge of the laws of Georgia, acquired by study and practice in the courts for the last 25 years.

The ordinary of the county in which the intestate dies, if a resident of that county, appoints the administrator.

It was here conceded by counsel on both sides that plaintiff was duly appointed administratrix, in State of Georgia, of her deceased husband's estate.

Witness continued :

By the laws of Georgia the legal title of the personalty vests in the administrators. Prior to Dec., 1866, it was not required by the laws of the State that there should be included in notices of sales by administrators at public outcry the terms of sale."

Plaintiff's counsel then read in evidence from the code of Georgia, published in 1873, the sections numbered as follows: Secs. 1950, 1951, 2619, 2620, 2625, 2629, 2630, 2631, 2636, 2644, 2648, 2483, 2556, to 2569, inclusive; and also laws of 1866, at page 65, as to terms of sale.

The plaintiff then called as a witness JENNIE L. GRAVES, who, being duly sworn and examined, on her own behalf testified :

I am the plaintiff. I went South with my husband, Cyrus S. Graves, from this State in 1858, and located at Thomasville, Ga., 200 miles west of Savannah. He was a lumber merchant. He put up the saw-mill at Homerville in 1861 or 1862. Homerville is 100 miles west of Savannah, and 100 miles east of Thomasville, on the Atlantic and Gulf Railroad. It was a small place, with perhaps 30 residents. My husband and I lived in Homerville during the running of this mill. We had a house and lot there, a very little distance from the mill. Where the mill was it was wild land; that is, timber land. There was a lot of an acre between our house and the mill. I was not at the mill
48 while it was being put up. It was a portable steam mill. The machinery—that is, boiler and engine and saw-mill—were shipped from the North, and were put up under a shed open at the sides, and had a board roof to protect the machinery. There were timber supports for the roof where the engine stood. The machinery rested on timbers that went lengthwise of the mill. I think those were put on wooden blocks. This mill, when spoken of, was called a portable steam mill—a kind of mill in use there. It was built in the winter of 1861-1862. I went there on the 4th June, 1862. We lived there about nine months. My husband died in 1862. I saw the mill frequently while I was there.

Q. What was the first thing above the ground standing on the blocks?

(Objected to by defendant's counsel, that the witness is not competent to answer.)

By the COURT. She may state how it was, as she saw it.

WITNESS. There isn't anything of those mills except the machinery. The boilers are so built, with iron supports, that they are near the ground. The engine, I think, is attached to the boiler—at the side, I think. I can't give a description of it; it was built as engines always are, as far as I know. For foundation there was hewed timber to make it solid, and the boiler rested on that. There comes with the boiler some supports, and there is a furnace before the boiler; the fly-wheel was just at the side of the boiler; then the saw-mill is placed at a little distance, and is operated by a belt. It is a patent saw-mill; there was no mason work about it.

My husband left two children. At his death he was a resident of Thomasville, and I was appointed his administratrix in November, 1862. I came North in 1864 with my children.

The first that transpired between me and these defendants about this saw-mill was they wrote me a letter about the 1st of December.

Q. Take these copy letters (counsel handing copies of the letters in evidence) and show which is the one you refer to.

A. The one of December 1st. I was then living in Cortland County with my mother. My post office address was Cincinnati. The next thing that occurred was a Mr. Pusey came to see me at my mother's house.

Q. What occurred between you and him?

It was here conceded by the parties that Pusey was the agent for the defendants.

WITNESS. Mr. Pusey introduced himself as Mr. Edward Pusey, of Wilmington; said he was an agent for J. Morton Poole & Co. Says he, They have written you a letter. I said I had received it and answered it. He said, "It didn't reach before I left." He told me Mr.

49 Poole had been down to the mill, and that Norwood was a partner; that Mr. Poole was just returned from there, and "I have come up to see you, to know how you will sell mill or lease it." I told him I didn't want to lease the mill, it seemed so remote from where I was living; I would rather sell it. I told him I would sell for \$5,000, or rent for \$150 a month, but I should want a bond that the mill should be returned in good order, except the natural wear and tear. That is the way in which it has been leased before. He said, "Well, I am safe to say J. Morton Poole & Co. will accept your price for the mill." I said, "I can give possession of this mill the 1st of January, 1866." I said, "It is under a lease to Lovell & Lattimore, but I understand Norwood is operating it under an assignment from them of the lease." He said to me, "Mrs. Graves, I can't conclude it, but you are safe enough to consider the mill sold, for I am quite sure your price will meet with acceptance." I told him that my husband died without a will, and that I was the administrator, and that at the time I came North I could not bring any papers with me.

By a JUROR :

Q. What did you say to Mr. Pusey about the price?

A. I said I would sell the mill for \$5,000.

Q. What did he say to that?

A. He said he had no doubt but that proposition would meet with acceptance. He said he had no authority to conclude the bargain. At his request I wrote a letter to J. Morton Poole & Co. This is the letter I sent; (letter without date).

Plaintiff's counsel here gave the same in evidence. It is as follows :

J. MORTON POOLE & Co.:

GENTLEMEN: I will sell you the mill at No. 11 A. & G. R. R. for \$5,000 (five thousand dollars), or rent it at the rate of \$150 (one hundred and fifty dollars) per month, for such time as I can find it at my advantage to do so. I shall require a bond for the full value of the mill, provided it should be rented and destroyed. This I say, provided I find by reference that you are responsible parties.

Very respectfully, yours.

JENNIE LOUISA GRAVES.

Mr. Pusey told me that J. Morton Poole & Co., in Wilmington, were entirely responsible, and gave me a reference to a Mr. Evans in this State. Mr. Pusey said that they were the responsible partners. He stated they were Wm. T. Porter and J. Morton Poole. I had no knowledge of either of them, or of Mr. Norwood. Mr. Pusey gave me for reference a man in Deposit, whom I did not consult. I wrote to a friend of mine, Mr. McDonald, of Philadelphia. After that, this correspondence which has been read in evidence occurred. I went to Georgia the last of February, 1866, by sea. I arrived at Savannah and went from there to Thomasville over the Atlantic and Gulf Railroad. I saw

50 Mr. Norwood at Homerville, as I was passing on the train to Thomasville. He was a stranger to me. He was brought in by the conductor of the train at my request. When I met him I said to him: "Mr. Norwood, I understand that you are running the mill;" he said, "we are; I said, "in connection with J. Morton Poole & Co.;" he said, "yes;" said I, I have had a correspondence with those gentlemen, and they have proposed to buy the mill, and I want to sell it. I have had other offers for it, but you are in possession, and, Mr. Norwood, if you want the mill, I would like to have you come to Thomasville and perfect the sale. It was there I took letters of administration and want to make a good sale of it; it is my errand down here, and I would like to have you come up and satisfy yourself that the title is all right; I shall do everything on my part that is necessary." He said he would come. Said he, "I will come up in a few days; but," said he, "I would like to ask this, that you wait until I see my lawyer, a gentleman in Savannah, and I make myself a little better acquainted with what is to be done." I said, "Mr. Norwood, I will wait for you;" he said he would come up after he had seen Mr. Bassinger; that was the most of the conversation. This was while the train was stopping there, and occurred in the cars. I afterwards saw Mr. Norwood when he was examined in the case; it was the same man.

This station was very near the mill, nearer than the hotel is to this court-house. At that time I did not make any reference to the objections which J. Morton Poole had made in this correspondence. I went on to Thomasville; Norwood came four or five weeks after. I was stopping with my husband's sister, the wife of Edward Thompson; they were then at their plantation home, four miles out of the city. I had called on the ordinary before Mr. Norwood came. The ordinary is now dead.

It was about four or five weeks before Norwood came. Nobody was present at the conversation I had with Norwood.

When I met Mr. Norwood I said, "Mr. Norwood, you have kept me waiting a long time. He said, "I am sorry; there was occasion for it; the first time I went to Savannah I didn't see Mr. Bassinger, and I waited until I went again, but I have seen him." Said I, "Mr. Norwood, what are your conclusions as to the sale of the mill, and in regard

to buying it?" Said he, "To make a perfect title to the mill to J. Morton Poole & Co., my partners, I think it is best to have a sale made at public outcry." Said I, "Mr. Norwood, how is that?" and he went on to explain, and told me the necessary proceedings. He told me that I would have to have notices posted; but, says he, "Before all this, it will be necessary to have an order from the ordinary." Said I, "The ordinary says that he will give me an order to sell. I have been to see him; I don't know whether the order has been granted or not; it hasn't come to my hands." Said he, "After that you will have to have notices drawn, and have them posted, and have to send some person to bid off the mill."

Q. To bid it off?

A. Well, to auctioneer it off; to act as auctioneer. I said, "Will it be necessary for me to attend the sale?" He said, "No."

"Well," said I, "Mr. Norwood, I can sell the mill to this man with whom I am stopping; he is anxious to buy it; he will pay me the same price; your partners have raised some objections as to buying it; in the first place they seemed satisfied with the price that I asked, but during the correspondence we have had they made different requirements; they wanted me to throw in the house and lot, include that in the bargain." I told him I couldn't do it; and said I, "They have raised questions as to the title, and I would no sooner answer one objection than there would seem to be another raised." Said I, "I want to make a sale of this mill, and if you don't want it I will sell it to Mr. Edward Thompson." "Well," said I, "Mr. Norwood, if you want the mill, I will go on and make the sale." He said, "I will do that; I will bid the mill off." Said I, "Will it be necessary for me to attend?" He said it would not.

Q. Anything said about the payment?

A. Yes, sir.

Q. State what.

A. Mr. Norwood said, "I am not the monied partner; if the money is sent to me from Wilmington to pay for it on the day of sale I will pay for it; but if not, my partners in Wilmington will send it to you." He said, "I don't know whether they will send it to me or not; if it is not paid to you on the day of the sale, Messrs. J. Morton Poole & Co. will send it to you." I told Mr. Norwood that as soon as the mill was sold and my business finished there I should return to my home in Cincinnati, N. Y. I think this call was the day before those notices were issued by the ordinary. I said to Mr. Norwood, "Your principals have raised a question of title." "Well," said he, "Mrs. Graves, I am entirely satisfied as to that; I have been to see the ordinary, and I know you have taken letters of administration, and I spoke about the land." I said, "Mr. Norwood, they have asked about the land; I don't own but one acre of land at Homerville, and that is the one on which the house stands." Said he, "Mrs. Graves, I have been operating your mill for six months on a lease from Lovell & Lattimer, and I know you don't own the land; I know the land is owned by John H. Mattox." I spoke to Mr. Norwood that they wanted me to make an assignment of an obligation that I held against Lovell and Lattimer, that they had wanted me to include that. He said that I had said to him that I would sell him the mill for \$5,000. "Well," said I, "there are certain fixtures and blacksmiths' tools and other tools necessary for the operation of the mill, and I will include those in the \$5,000." He said, "I know you couldn't include the house and lot in this sale; there would have to be a different sale, a different proceeding; he said that was real estate;

he said he would like to occupy the house, and would pay for it. He said, "I would like to occupy the house, and will pay you a reasonable rent for it."

Q. Was anything said as to whether they were or not in possession of your mill, operating it then?

A. He said he was. He spoke of the business. He said, in regard to going to Savannah, he waited until he took down another load of lumber he was shipping then to the Savannah market. He said he took the liberty to wait till he went down with another load of lumber.

Q. Did he say anything about what the lawyer, Bassinger, had advised about the title?

A. Yes; he said Bassinger had advised him to have a public sale—have the mill sold at public outcry.

Q. Anything said about your going before the ordinary?

A. Said I, "Mr. Norwood, I will go with you, as I said I would when I met you." He said, "Mrs. Graves, that will not be necessary. I have seen him this morning, but I will go and see him again when I return to town, and I will tell him about this"—about our conclusion. The next day I went to the ordinary.

Q. What did the ordinary do, so far as you know?

A. I think the ordinary had during the interval granted the order to sell the mill.

Q. Did he hand you any order?

A. I think he did during the day; I think it was at that time I received the order. I think it bears a previous date. I don't remember what date.

Q. What else did he do?

A. He drew the notices of sale, and gave me directions as to the sale, and he drew for me a power of attorney; that power of attorney is lost. I lost it on my return from Georgia, in the city of Washington, at Grant's last inauguration. When I left the hotel I had that power of attorney in a large pocket-book—a morocco pocket-book—and I put it in my pocket, and when I was seated in the car, I put my hand to see if the pocket book was there, and it was gone. I have never been able to find it since. The power of attorney was addressed to Edward O. Thompson, of Thomasville. I read it.

By defendant's counsel. I desire to ask some preliminary questions; which was allowed.

Q. You say this power of attorney was executed in Thomasville; whereabouts was it executed?

A. At the ordinary's office. It was at the time these notices were drawn; I can't give the exact date; it must have been about the 16th of April. There was present the ordinary's clerk, James L. Seward, and Mr. Thompson. I signed it in the ordinary's presence. I think the clerk, Mr. Seward, witnessed it. It was given to Mr. Thompson. I don't know whether there was a seal to it.

By defendant's counsel: Do you know what a seal is?

A. I think I do.

Q. Your idea of a seal is what?

A. My idea of a seal is a certain stamp put on papers.

Q. Something attached to the papers?

A. Yes, sir. I don't think there was anything of that kind.

Q. Was there any other formality in its execution than your mere signature and the signing by the witness?

A. I don't recollect that there was.

Q. You were not requested to acknowledge the execution of it in any shape?

53 A. I think nothing further than signing it.

Q. How soon after its execution was it handed to Thompson?

A. At the same time; I haven't any distinct remembrance as to just when, but think it was while we were there.

By plaintiff's counsel. Do you remember whether it was acknowledged or not?

A. I don't know as I know what is meant by acknowledging.

Q. Did the ordinary ask you whether you acknowledged the execution of it, or anything like that?

A. Oh, he did.

Q. After it was drawn, do you recollect whether he asked you whether you acknowledged it or not?

A. I think he went through some formality with regard to it.

Q. How did the clerk, Seward, come to sign it?

A. Well, I don't know how he came to sign it. It was written on foolscap sheet.

Q. What was the import or substance of the power of attorney?

(Objected to by defendant's counsel as incompetent; the subscribing witness should be called.)

Q. Seward resided then in Thomasville?

A. Yes, he was a clerk for the ordinary; whether he is dead I don't know.

Q. State the substance of the power of attorney.

(Objected to by defendant's counsel on the same ground as before; also that the handwriting of the subscribing witness should be proved; also that the loss is not sufficiently established. Objection overruled. Exception taken by defendant's counsel.)

Q. (By defendant's counsel.) Mrs. Graves, you say that you had this in a pocketbook?

A. Yes, sir.

Q. Had you carried that pocketbook on your person all the time?

A. I had not. I put it in my pocket when I was just about leaving the Metropolitan Hotel, in Washington, on March 4th, 1873; it was at Grant's inauguration. It was in the evening after the inauguration. I took a hack from the hotel; there was nobody in my company. I was all alone on that occasion. I had been at Georgia, and was returning from there. I had pocketbook and paper with me in Georgia. I had exhibited it to Judge J. R. Alexander, an attorney in Thomasville. Judge Alexander gave me that paper the evening before I left Thomasville; I had given it to him so n after my arrival there; he had it probably five days.

Q. Had its contents been discussed between you and Judge Alexander?

A. Yes, sir. This was in February, 1873; on this occasion I was consulting Judge Alexander as to the contents of this paper and other papers. I had other original papers in that pocketbook. I had a paper that was furnished me by my counsel, and some facts that Mr.

54 Alexander's attention was to be called to; I had a paper from Col. McIntyre. There might have been others; I can't say distinctly. I don't remember anything distinctly; there might have been some letters in it; I can't state; I am not prepared to swear that there were any original letters.

Q. You wouldn't swear that there were original letters?

A. No, sir; aside from this communication I have named. There

were also paper and envelopes I had for my convenience. This pocket-book was quite large; such as gentlemen use for carrying papers in.

Q. Was it as large as that Bible lying on the bench?

A. It was longer and not quite so broad.

Q. How thick was it?

A. The pocketbook itself was not so very thick.

Q. Well, with its contents?

A. I can't tell; it was so I could put it in my pocket.

Q. Was it an inch thick?

A. I don't know but it was; it probably was with the papers in it.

Q. How long had you been carrying that pocketbook about with you in that way?

A. Well, I don't know; the satchel was all the baggage that I had, and when I was at the hotel I put it on the dress case of bureau, and it was from there that I took it when I put it in my pocket.

Q. Was that the first time you had carried it in your pocket?

A. I don't know but it was; and I may have carried it there before.

Q. Which pocket did you carry it in?

A. In my dress pocket.

Q. Did you have more than one pocket in your dress?

A. No, sir.

Q. On which side was that?

A. It was on the right hand side.

Q. Did you have that satchel with you?

A. Yes, sir.

Q. How large a satchel was that?

A. It was an ordinary satchel.

Q. With your wearing apparel in it, &c.?

A. Yes, sir.

Q. Did you remain at the depot for any length of time?

A. I did.

Q. For how long?

A. The train did not start on time, I recollect. There was a very great crowd.

Q. Did you buy your ticket at the depot, or did you travel on a through ticket?

A. I think I had a through ticket.

Q. And entered the cars?

A. Yes, sir.

Q. When did you first miss this pocketbook?

55 A. When I took my seat I put my hand in my pocket and found it was gone.

Q. Anything else in the pocket?

A. I think there was.

Q. What?

A. Handkerchief and gloves: I can't say just what; I recollect of nothing else of any bulk.

Q. When had you yourself personally last read over the contents of this paper?

A. I think I read it over when I went to see Judge Alexander.

Q. Have you any distinct recollection of having read it on that occasion?

A. I think I did.

Q. In his presence, or alone?

A. I think I read it while in his office.

Q. Where had you gone from to go to Georgia?

A. From Cincinnati.

Q. And had you traveled directly through, or had you stopped on the way?

A. I had stopped in Washington, going as well as returning.

Q. From Washington you went on to Thomasville?

A. Yes, sir.

Q. Did you stop at any other point?

A. I stopped at Savannah a single day.

The COURT. I think these inquiries have been pursued far enough as to the loss of this paper.

By defendant's counsel. If your honor will permit me to ask one question as to the ticket.

The COURT. Yes, you may ask that.

My railroad ticket was carried in my portmonaie; I had a little pocket on the inside of my sack, where I carried that.

Q. Will you permit me to ask what purpose you had in carrying this document to the South with you?

A. I took it there for the purpose of showing it to Judge Alexander.

Q. Did you take any other papers or letters or correspondence in this case at the same time?

A. Well, I might have taken some others, but I don't remember; I don't think I did.

By plaintiffs' counsel:

Q. Now you may give the substance of what the power of attorney said.

(Objected by defendants' counsel as incompetent, and the loss not sufficiently proved; objection overruled; exception taken by defendants' counsel.)

A. It was a power of attorney that was given Edward O. Thompson to act for me in the sale of the mill which was to be made at Homerville to perfect the title to J. Morton Poole & Co.

Q. Did you say anything to Thompson as to calling upon Norwood at the mill?

(Objected to as irrelevant and incompetent; objection overruled, and evidence admitted for the purpose of showing what directions were given by plaintiff to Thompson; exception taken by defendants' counsel.)

A. I told Mr. Thompson that probably Norwood would be there to bid off the mill for J. Morton Poole & Co.; I gave him directions about calling on him, and about price.

Q. What did you say to him about the price?

(Same objection, ruling, and exception.)

A. I said to Mr. Thompson that they would pay \$5,000 for the mill; I told Mr. Thompson what Mr. Norwood had told me about the payment; that he might not have the money.

Thompson returned to his house on the night of the 30th of April. He didn't bring me the money. He gave me back the power of attorney. I think he gave me one of the notices of sale.

Q. Was there anything on the power of attorney when he handed it back you that was not on it when he took it from you at the ordinary's?

A. There was. What there was was in Thompson's handwriting; I knew his handwriting.

Q. What was that memorandum?

(Objected to by defendants' counsel; first, that the facts already in evidence show that Thompson was not the auctioneer; second, that the facts show that there was no auction sale; third, that there was no evidence to fix the time when the memorandum was made)

The COURT. I will receive the evidence.

(Exception taken by defendants' counsel.)

A. I don't know as I can give the words. I think it was dated "April 30th, 1866; I have this day, or to-day, sold at Homerville, for Mrs. Jennie L. Graves, her saw-mill, to perfect a title to to J. Morton Poole & Co.; the same was bid off by W. G. Norwood for them, or for J. Morton Poole & Co.; price \$5,000.00." Signed by Mr. Thompson. That is as near as I can tell; it was the substance.

Q. Where was it written?

A. It was written on the back; that is, the paper was folded and then unfolded and written on the back of the sheet.

Q. He gave it you?

A. Yes, sir.

Q. And you had taken it home before you lost it?

57 A. Yes, sir.

Q. And had had it at home?

A. Yes, sir.

Q. How soon did you leave for home?

A. Within a few days. I think on the 6th of May. My husband's mother returned with me. I came by steamer from Savannah and then by the Erie Railway.

Q. How soon did you communicate, and how did you communicate, in respect to the sale and price of the mill with J. Morton Poole & Co.?

(Objected to as leading and implying a communication which has not been shown to have taken place.)

Q. Did you communicate with them?

A. I did; I wrote them a letter; wrote J. Morton Poole & Co. a letter from New York on my return; wrote it at the depot, and think it must have been about the 10th of May; addressed to them at Wilmington. To that I have never received any reply. I wrote to them again from my home about ten days after. I have had no reply to that. I afterwards called and saw them, in company with Mr. Charles Foster, of Cortland, N. Y., at Wilmington, Delaware, where the gentleman resided. I then made known my request to Mr. Porter, the gentleman that is here. He did not yield to my request. Then, subsequently, this action was brought for the price of the mill. It never has been paid to me.

Defendant's COUNSEL. If the court please, I suppose this evidence in respect to letters being written is inadmissible unless it is followed up by proof that the letters were received; and I ask that that part of the evidence be stricken out.

THE COURT. I think it is well enough for her to state that she wrote them a letter and did not get her pay. That may stand.

(Exception taken by defendant's counsel.)

Cross-examination by defendant's counsel:

Q. After going South in 1866, when did you next visit the South, if at any time?

A. In February of 1873, I was gone from home two or three weeks; that was the occasion when I called upon Mr. Alexander. Mr. Goodrich was not in my company at that time. I next went to Georgia in August the same year, think, or else it was in 1874; yes, I think it was 1874. My counsel, Mr. Goodrich, was in company with me at that time

and Mrs. Goodrich. I was present while depositions were being taken at Savannah. I heard Mr. Norwood's and Mr. Cooper's taken; none others. From Savannah I proceeded to Thomasville; Mr. Goodrich accompanied me. I was present at the taking of depositions in that place, a part of the time at the examination of the ordinary, that was all. Mr. Thompson was present when Mr. Tooke's examination was taken, a part of the time. Mr. Thompson was also examined at that time as a witness; his examination was not completed.

58 Captain Hammond represented the defendant as attorney. Mr. Alexander was not examined at that time. I think he was consulted.

Q. Had you, prior to the letters which are read here, and which commence in date December 1st, 1865, written any more letters to either of these parties, making offers to sell this property?

A. I had written to Mr. Norwood. I think I had written more than once during the time that he was operating the mill under the lease.

Q. Did you at any time offer to sell this property at a less price than \$5,000?

A. I think I did in the month of July, 1865; that price was \$4,000.

Q. Was that offer accepted?

A. No, sir.

Q. Will you give the conversation that passed between you and Mr. Norwood, at Homerville, in the cars?

A. I was introduced to Mr. Norwood, or rather the conductor brought him in at my request. I met Mr. Norwood and said to him that I was Mrs. Graves. Said I, Mr. Norwood, I understand you are running the mill or operating the mill. He said, We are. I said, In company with J. Morton Poole & Co.? and he said, yes. Said I, I have had some communication with those gentlemen in regard to selling this mill; they have sent a gentleman to see me; but it ain't closed, and I have come down here to sell the mill; I can sell it to other parties; but you say you are in possession, and if you want the mill I would like to have you come up to Thomasville where I am now going, and go with me to the ordinary to procure the sale; I am ready to sell the mill to you for \$5,000, the price I have mentioned to your partners. Said I, you are a partner of J. Morton Poole & Co.? He said, he was. Well, said I, Mr. Norwood, I would like to have you come up and go with me, that the sale may be perfected satisfactorily to all parties; and he said he would come. But he asked me to wait a few days. Said he, I want to go to Savannah and see my counsel there. And I think he said that he went down occasionally, or would be going down in a few days; and requested that I would wait before selling to other parties; I told him I would.

Q. Was that all?

A. That is all I can recall.

Q. Did the conversation end there?

A. I think so; and then Mr. Norwood left. The conversation was just during the stoppage of the train at Homerville; that was a station to get on and off; there was not a large number of passengers to get on and off there. They made the stoppage; I had the conversation, and the train went on and arrived in Thomasville the next morning. I cannot give you the date. It was some time the last of February, 1866, I think—I am sure it was in February, 1866. I left New York City some time during the latter part of the month. My last letter is dated February 26th, at Cincinnati. I did not leave before I wrote that letter. I went to New York, and from there I went by steamer to

59 Savannah. I staid there a day, or maybe longer; while I was in Savannah I did not call upon Mr. Bassinger. I don't remember that I made any inquiries concerning him. The usual passage to Savannah is three days; according to that, it must have been in March that I arrived there. On arrival in Thomasville, I went to the house of my husband's sister, Mrs. Thompson—I think the next day or the day after I saw the ordinary.

Q. Did you have any business transactions with him?

A. I did. Mr. Norwood came, I think, on the 15th of April, about six weeks after the meeting on the cars.

Q. During that time had you made any efforts to sell this mill?

A. No, sir.

Q. Had you conversed with any parties about the sale of the mill to them?

A. I had; among others Mr. Thompson, who is my brother-in-law. The only interview subsequent to meeting Mr. Norwood on the cars was the one I had with him at the house of my brother-in-law, Mr. Thompson. I think that was on the 15th of April. I did not see him at any time subsequent to that before the sale. I did not see him after the sale until the examination in Savannah, in 1873 or 1874. I had no correspondence with Norwood prior to this interview, after I had seen him at the station at Homerville.

Q. Please state what was said between Mr. Norwood and you in the conversation at Thompson's.

A. I said to Mr. Norwood, upon his arrival, you have kept me waiting a long time. He said, I am sorry; the first time I went down to Savannah I didn't see Mr. Bassinger, the gentleman I said to you I would want to see; but the last time I went down, I succeeded in seeing him. Said I, Mr. Norwood, what are your conclusions in regard to the mill? Said he, I think the proper way, or the better way, to sell this mill is to have it sold by public outcry. I didn't understand about such sales. Said I, Mr. Norwood, how is such a sale made; would it take a great deal of time? And he went on to explain to me how such a sale would be made. He told me there would have to be certain notices, and that they would have to be posted, and I think he said there would have to be 10 days' notice given. I asked him if it would be necessary for me to attend the sale, and he said no, I could send some person to act for me. I said, Mr. Norwood, I want to have a full understanding about the mill; I have had a good deal of correspondence with your partners in Wilmington, and at first when they sent Mr. Pusey to see me, I fixed the price of the mill at \$5,000, and they seemed to be perfectly satisfied about it; Mr. Pusey said he thought and was confident that that proposition and price would be accepted. In their first letter they didn't find any fault with the price. I proposed renting it, and they said they couldn't rent it at the price that I fixed. I told him that was \$150 a month. I said in the course of this correspondence they wanted me to put in a house and lot that I owned. Said he, I am occupying that house, and I would like to arrange for the rent of the house. Said he, Mrs. Graves, that house could not be included in this sale, because that would have to be a different proceeding. Then I told him, they have raised a question about the title. Said I, Mr. Norwood, this I understand to be personal property, and I asked him to go with me up to the Ordinary's, so that he might know about it; and he said that he had been there, and had satisfied himself as to my qualifications to dispose of the property.

Q. Did he mention when he had been there?

A. I think he said he had been there that day. I said to him, "Mr. Norwood, I will go with you. You have kept me waiting; I am anxious to get home, and there are other parties here. The gentleman with whom I am stopping will pay me that price for the mill, and take it off my hands without any further trouble, and I said to him, if you don't take the mill he can have it, and I asked him to say distinctly whether I should proceed with the sale, and he told me to proceed with it, and he said he was going to see the Ordinary. I talked the whole business over with him for an hour or two hours, and perhaps a little longer. I can't say just how long, but we had a very full conversation about it.

Q. You say something about a suggestion being made on the part of J. Morton Poole & Co., of including a claim against Lovell & Lattimer?

A. Yes, sir.

Q. Was that stated in your conversation with Norwood?

A. I think it was.

Q. State what it was.

A. I stated to Mr. Norwood that they wanted me to include in this sale an obligation I held against Lovell & Lattimer, and I told him I couldn't include that.

Q. Was that all you said to him about that?

A. I think it was.

Q. What was the amount of that obligation?

A. It was a note of \$800.

Q. Did you exhibit any of the correspondence which you had received from the defendants, J. Morton Poole & Co., to Mr. Norwood?

A. No, sir.

Q. You knew when you were having this conversation with Mr. Norwood that the firm in Wilmington, Delaware, had told you that they wouldn't buy this mill without the land, did you not?

A. No, sir; they hadn't retracted their proposal entirely.

Q. You understood that they insisted upon a title to the land?

A. I knew that they insisted upon a good title for the mill.

Q. Did you not know that they insisted upon a good title for the land?

A. They knew that I didn't own the land.

(Question repeated.)

A. I knew that they asked for a title to the land.

Q. Did you tell that in any different way to Mr. Norwood than you have stated; that they insisted upon a title to the land?

A. I don't know that I did.

61 Q. Did you in that conversation complain to Mr. Norwood of the treatment that you had received at the hands of J. Morton Poole & Co?

A. I think I did.

Q. In which of those conversations?

A. At the house.

Q. You gave him to understand, did you not, that J. Morton Poole & Co. hadn't purchased this property and didn't intend to purchase it from you?

A. No, sir.

Q. What did you give him to understand then in respect to their correspondence and dealings with you?

A. I gave him to understand, as I have stated, that they had made certain propositions, and I told him in the meantime what objections they had made to the sale; that they wanted me to include certain things.

Q. You put it to him simply that they had made objections and had not, as you understood it, refused to deal with you in respect to this

property. Is that the account you gave him of what the correspondence between you and J. Morton Poole & Co. had been?

A. I cannot tell you any different from what I have.

Q. When did you last see this mill?

A. I saw it when I was down there in March, 1873, I think, or I can't say that it was that mill, there was a mill at that place.

Q. When did you last see this mill?

A. I haven't seen this mill since my return in 1866. I saw it on my return on the railway; I did not get off and go to it; simply passed on the cars. I haven't been to the mill since my husband's death; that was in November, 1862. There was a cistern, or well, or tank for water; that was part of the arrangements, as well as boiler and engine; there was a well from which water was pumped into a tank. The tank was located outside of the mill building; it was something to feed the water of the boiler.

Q. There has something been said about this house; wasn't that occupied by the foreman who ran the mill?

A. I think it had been.

Q. Did you not receive from Mr. Norwood after this alleged sale certain letters in respect to giving up this property to your agent?

A. I did, in the ensuing November.

Q. Look at that (showing a letter) and say whether that is in your handwriting.

A. Yes, sir. (Marked for identification, C. G. T., dated July 18th, 1865.)

Q. Is that also (showing another letter) in your handwriting?

A. Yes, sir. (Marked for identification, C. G. T., dated July 25th, 1865.)

Q. Did you receive that letter, dated Nov. 28th, 1866, from Mr. Norwood?

A. I think I did. (Marked for identification.)

62 Q. Will you tell us where you got the notice of sale; did you have that in your possession and give it to your counsel?

A. I can't say whether I did or not.

Q. No recollection about it whatever?

A. No, sir; I gave him such papers as I had, but don't know what they were.

Q. Have you no recollection of having that paper in your possession that I now show you (notice of sale annexed to the deposition of Tooke)?

A. Yes, sir; I had that after the sale.

Q. From whom did you receive it?

A. From Mr. Thompson.

Q. Do you recollect when?

A. I think it was on his return from the sale at Homerville; I am quite certain it was.

Q. What did you do with it after you received it from him?

A. I kept it.

Q. Brought it to the North with you?

A. I think I did.

Q. Did you take it South with you again when you went to consult Mr. Alexander?

A. I don't think I did.

Q. Where did it remain?

A. It remained with my other papers; they were in my possession until they were given over to my counsel.

Q. Did any other counsel besides Mr. Goodrich have these papers in his possession?

A. Yes, sir.

Q. Will you name him?

A. Mr. Daniel Dougherty, of Philadelphia.

Q. For how long a time did he have them?

A. He had a part of them, I think, from 1868 until 1872; and a part of them he didn't have as long; a portion of them he returned to me.

Q. Did he have the power of attorney spoken of?

A. He has had it.

Q. Did you see him and consult with him in reference to these papers?

A. I did.

Q. Was that power of attorney talked over with him by you?

A. Yes, sir; I think it was.

Q. Was that notice of sale with him as well?

A. I think it was; I took to him whatever papers I had when I went to consult him.

Q. Did you consult any other lawyers besides Mr. Dougherty?

A. I did.

Q. Who?

A. Mr. Sedgwick, of Syracuse.

Q. Did he have the papers too?

63 A. Not in his keeping; I took them to him; a part of them he read and a part he didn't.

Q. As I understand you, you have testified that you never went to Mr. Bassinger at all, in respect to this sale?

A. No, sir.

Q. You recollect the letters in which you were requested to lay the evidence of your title before him and he would draw upon the defendants in payment of that mill?

A. I recollect them.

Q. But you didn't attend to that at all?

A. No, sir; but Judge Tooke wrote to him for me.

By defendants' COUNSEL. I move to strike out the latter clause of that answer as not responsive.

(Motion denied; exception taken by defendants' counsel.)

Q. Was Mr. Tooke any relative of yours?

A. No, sir.

Q. He undertook to do some business for you, didn't he, in this connection?

A. He did, as ordinary.

Q. He drew the power of attorney for you, didn't he?

A. Yes, sir.

Q. And he drew these notices for you?

A. Yes, sir.

Q. And he wrote to Bassinger for you?

A. Yes, sir.

Q. That was all his business as ordinary; you think?

A. I don't know whether it was a part of his business or not; I don't know what an ordinary's business is.

To further questions by defendants' counsel witness answered: I went to Wilmington, Del.; I remained one day and night; I think I remained two nights; I hadn't seen Mr. Dougherty then.

Q. I think you testified on the former trial that there was another

Mr. Thompson that you could have sold this property to, and who offered you a price for it?

A. Yes, sir; William W. Thompson.

Q. Then there were two Mr. Thompsons ready to buy this property?

A. Yes; Edward O. and William W. Thompson. In the offer by William W. Thompson, which was in fore part of the winter, no price was named, I think. I had an offer from Mr. Edward Thompson of \$5,000⁸⁰/₁₀₀%. That offer was made while I was there, soon after my arrival, before Mr. Norwood came to me.

Q. And was that Mr. Thompson responsible?

A. Yes, sir.

Q. I understood you to say in some of your letters that you made other sales of property in Georgia?

A. Yes, sir.

64 Q. Had you at that time had an order of the ordinary to make those sales?

A. I think I had.

Q. When you saw Mr. Norwood on the cars you told him that your purpose to visit the South was to perfect the title, did you?

A. To perfect a sale of the mill.

Q. Which sale was to what parties, as you understood it?

A. I said to J. Morton Poole & Co., if they wanted it.

Q. Did you put in "if they wanted it"?

A. I think so.

Q. Didn't you tell him that your business to the South was to perfect a sale of that mill to J. Morton Poole & Co.?

A. I think I said, "My business down here, Mr. Norwood, is to sell this mill; if J. Morton Poole & Co. want it, I will give you the first opportunity of having it."

Q. In your correspondence to these parties you didn't mention the order of an ordinary being required you knew it at the time, did you not?

A. I think I did mention it. I recollect mentioning it to Mr. Pusey, and I think I mentioned that I had written for it; I am not quite certain.

Q. Had you ever sold property there before at public outcry?

A. No, sir.

Q. Didn't you know that the law of Georgia required the sale of personal property to be at public outcry?

A. No, sir.

Q. When did you first learn about that?

A. I learned more particularly about it from Mr. Norwood when he came to Thomasville to see me. The ordinary may have explained something about it when I first went to see him after my arrival there; when I asked for the order to sell the mill he may have told me. I don't remember about it.

Q. Did you tell the ordinary when you first made that application that you wanted to make it for the purpose of selling it to J. Morton Poole & Co.?

A. I told him about the correspondence; I told him that I had had an offer from them.

Q. Do you recollect whether or not your application stated to whom you desired to sell the mill?

A. I do not.

Q. You made an application in writing, did you not?

A. No, sir; I think not; I think I made an application before I went

South; that I sent it from Cincinnati, asking the judge to send to me an order, or asking if he would grant an order to me to sell the mill; but when I made the application in Thomasville it was verbal; I went to his office.

Q. Did you sign a paper then?

A. I think I did not.

Q. Do you recollect such a paper as that being drawn up and signed by you in the ordinary's office (showing witness a paper)?

65 A. I can't identify the paper.

Q. Do you recollect it by its contents?

A. I don't recollect signing such a paper.

Q. Do you recollect anything about that paper or the contents of it?

A. I recollect about making an application for an order to sell the mill.

Q. Do you recollect the contents of this paper (counsel reading it to witness); do you recollect signing such a paper as that?

A. I may have signed it. I don't recollect that particular paper. I signed such papers as he advised me were essential for the perfection of the business.

Q. Is that letter in your handwriting (showing witness paper)?

A. Yes, sir.

Q. When did you write that?

A. I wrote that before I went South in 1866.

Q. What does it purport to be?

A. It is a copy of a letter that I had from J. Morton Poole & Co.

Q. You had the original at that time?

A. Yes, sir.

Q. Where was this copy made?

A. At my house.

Q. What became of the original?

A. It was lost.

Q. Did you take that with you or did you leave it?

A. I left it.

Q. You took this copy with you?

A. I did.

Q. Did you show that copy to any parties?

A. No, sir.

Q. What did you do with it?

A. I didn't take any notice of it whatever.

Q. Do you recollect on the former trial that copy being produced in evidence?

A. Yes, sir.

Q. Did you testify it was an exact copy of the original?

A. I did to the best of my recollection.

Q. Are you prepared to testify now that it is an exact copy of the letter you received from J. Morton Poole & Co?

A. Well, it doesn't seem to be. I supposed it was.

Q. Was that copy introduced in evidence by your counsel, as a copy of the letter you had received from J. Morton Poole & Co. on the former trial?

A. I think it was.

(Marked for identification, C. G. T., dated Dec. 21, 1865.)

Redirect examination by plaintiff's counsel:

66 I consulted Mr. Dougherty in December; it was in the winter of 1868. I consulted Mr. Sedgwick after the receipt of the letter from Mr. Norwood, in November; the case was finally

placed in Mr. Goodrich's hands in 1871 or 1872; I don't remember exactly.

The notice of sale here shown me is in the same condition as when I received it from Mr. Thompson; it is the handwriting of the ordinary; I know his handwriting. Since the sale I have had nothing to do about the mill. Mr. Thompson had made the offer for the mill which I spoke of to Mr. Norwood. Previous to my going down South other offers had been made for the mill; one by a party in Baltimore, and another by a Mr. Watson, a former partner of my husband. He was from New York.

Before receiving these letters from Mr. Norwood I had not heard any mention made of any firm by the name of Norwood, Porter & Co.

Plaintiff's counsel here gave in evidence two letters received by plaintiff from Norwood, and signed "Norwood, Porter & Co.," dated one Nov. 1st, 1866, the other, Nov. 28th, 1866.

EXHIBIT B.

HOMERVILLE, Nov. 1st, 1866.

Mrs. J. L. GRAVES,
Cincinnati, N. Y.:

MADAME: We now notify you that we have stopped operating your mill at this place. And we are now ready to deliver the same to any authorized agent you may appoint, and also pay any reasonable rent for the same from the first of January last.

You will please let us hear from you at once.

Yours, truly,

NORWOOD, PORTER & CO.

P. S.—Mr. Norwood has previously said that he would keep the house until January next, and settle the rent.

Yours, etc.,

W. G. N.

EXHIBIT C.

HOMERVILLE, Nov. 28th, 1866.

Mrs. JENNIE L. GRAVES,
Cincinnati, N. Y.:

MADAME: Annexed please find copy of letter sent you by our W. G. Norwood. under date of Sept. 27, also copy of a letter from us of Nov. 1st, 1866, both relating to the property at this place which you own.

We desire an immediate reply to these letters, as we are now ready to leave the mill and would like to turn it over to your agent.

As to the house, Mr. N. has not decided how much longer he will remain here, but probably not longer than 1st January next.

Yours, truly,

NORWOOD, PORTER & CO.

67 Q. Had you ever received the letter of September, referred to?
A. No, sir; I don't think I had.

Recross examined by Mr. BLACK:

Q Some time in July, 1865, did you receive letters from W. G. Norwood (showing witness)?

A. Yes, sir; that is the letter.

(Read in evidence by defendant's counsel, dated July 1st, 1865.)

EXHIBIT E.

SAVANNAH, July 1st, 1865.

Mrs. J. L. GRAVES,

Cincinnati, New York:

DEAR MADAM: I am now about making arrangements with Messrs. Lovell & Latimore, to lease from them a saw mill at 11 A. & G. R. Road, which belongs to you, which they tell me you will renew the lease of for next year or sell. You will please advise me by return mail on what terms I can have it for two years, or for one year, from expiration of present lease, with the privilege of releasing it for the second, or second and third year, should we desire it; also what you will take for the property in cash, and how much land is connected with it. If I lease, I can pay rent quarterly by remittance to you direct or to your agent in Georgia.

It is all important that I should have an immediate reply, so that I can give Messrs. Lovell & Latimore an answer as to whether I take it off their hands. I hear that there are some repairs to be made, to put it in order, which I will do if I lease it.

Yours, very respectfully,

W. G. NORWOOD.

Address me to the care of W. & F. King.

Defendant's counsel also read in evidence letter dated July 18, 1865, from the plaintiff to W. G. Norwood.

EXHIBIT F.

CINCINNATUS, CORTLAND Co., N. Y.,
July 18, 1865.

Mr. W. G. NORWOOD,

Savannah, Georgia:

DEAR SIR: Your favor came duly to hand. I should have answered you before, but waited to hear from Messrs. L. & Latimore. I would much rather sell than lease the mill, to disinterested parties.

You say it needs repairs. Messrs. L. & L. will of course do this; they cannot expect me to give them the use of the mill and keep it in order; rather too hard a bargain. I am very much surprised that they
68 have the mill again; on such conditions, however, I can only abide the regulations and hope for better success in the future.

They pay Mr. A. Graves in Confederate notes for the use of the mill until July. He acts as my agent, i.e., he was of the securities or sponsors on settlement of the estate; is a man of strict integrity, but age and disease has wasted his body, and doubtless his mind, else the gentlemen in question would not pay rent in such papers. I hope the residue of the year will bring something better. I know nothing of your responsibility; would not consent to your using the mill without a bond to deliver it in good order or pay for it if destroyed the value of the mill in U. S. bonds; this bond to be signed by responsible persons, together with your name. Messrs Alexander & Love, of Thomasville, have attended business for me, but I will authorize Young & McIntyre to draw the proper papers, if you take the mill. Here I will add for (\$4,000) four thousand dollars in United States bonds you can have full possession of the mill and fixtures. I will write to Thomasville, advising them of this arrangement. Could you forward a communication for me? Northern speculators are anxious to buy, but yours was the first

proposal, and you have the offer. Please advise me at your earliest opportunity. I will wait a few days your reply.

Very respectfully, yours,

JENNIE LOUISA GRAVES.

P. S.—Please write me by return mail if you could forward a letter to Thomasville for me, and oblige yours,

J. L. G.

Defendant's counsel also read in evidence letter dated July 25th, 1865, from plaintiff to W. G. Norwood.

EXHIBIT G.

CINCINNATUS, CORTLAND CO., N. Y.,
July 25th, 1865.

W. G. NORWOOD, Esq.,
Savannah, Geo.:

DEAR SIR: I hope you will excuse me when I say I acted too hastily in fixing a price to the property in Clinch Co., Ga.

I will add, I prefer selling rather than to rent, but must first advise with my friends in Thomasville. Allow me to ask you to forward to Thomasville two letters you will find addressed to your care. Please send them at your earliest opportunity, and I will be greatly obliged to you.

It is immaterial to me what parties run the mill, i. e., if they are responsible. I cannot learn anything direct or satisfactory or really conclusive from any one how Messrs. Lovell & Lattimore are running the mill this year. Will you please be enough interested for me to do me an errand to them? I had a very brief letter from their agent or clerk, signed W. F., which answered none of my enquiries in regard to taxes.

Were there any, and how are they paid? Also have you given a
69 bond to return the mill in good order, and insure against fire and accident? Nothing of the terms, only they believed their agent had arranged for the mill until July, for currency.

The avails of the mill for 1865 was not as good to me as one hundred dollars in gold. The note of \$800 (eight hundred dollars) they paid in currency. I was offered five times the value of in bonds in September, but I saw how the Union Army was overrunning us, and thought, bonds "are of no account." I am sorry to think as late as January they imposed \$1,800 of currency (current at paper mills) on me.

You doubtless see them often. Bear with me when I ask you to do this errand to them for me, or you may hand them the enclosed, which perhaps is the better way.

Messrs. McIntyre & Younge will write you and transfer the lease to you if all is satisfactory, and probably give you the value of the mill. I will ask my friends to see what order it is in, &c., and write you accordingly. Please write me if you intend buying. I think I can sell very soon to our "Yankee speculators." Please let me hear from you particularly if my letters go on.

I had the misfortune to burn my hand very badly, which makes it almost impossible for me for the last month to hold my pen.

I hope the price of the mill and the property may please you, and that it may do a good business. I remain,

Very respectfully, yours,

JENNIE LOUISA GRAVES.

It was here conceded by the parties that the defendants, Porter, Poole and Norwood, were partners.

Plaintiff rests.

Defendants' counsel then read the copy letter of Dec. 21st, 1865, before marked for identification.

WILMINGTON, DEL., *December 21st, 1865.*

MRS. JENNIE L. GRAVES:

MADAM: After a long delay we have your favor of the 13th inst. in reply to ours of the 1st, in which you decline to lease the mill, but offer to sell it for \$5,000.

From not receiving a reply promptly, we were led to infer that our letter had not come to hand, through our not knowing your proper address, and accordingly thought best to send a person to seek you out and confer personally with you (respecting the matter put into our hands by our friend W. G. Norwood). Your letter addressed to us by the hands of this person, Mr. Pusey, in which you offer to sell us the mill at No. 11 A. & G. R. R. for \$5,000 or rent it at the rate of \$150 per month for such time as you may find it to your advantage to do so, and 70 that you should require a bond for the full value of the mill if rented provided it should be destroyed; that is, if you find us responsible parties.

The price and conditions you attach to a lease of the mill cannot for a moment be entertained, and we suppose these unusual conditions are exacted from your determination not to lease the mill at all, but rather to make sale of it. Mr. Norwood we are confident will be governed by our advice, and our counsel to him will be decidedly to purchase the property, and if he acquiesces with us we will guarantee the money to you. In the mean time in anticipation of this result we would like to be informed what it is that you own at No. 11 A. & G. R. R.

We do not think your price unreasonable, and though Mr. Norwood is a partner and must be consulted, we say here as Mr. Pusey said to you personally to you, that we are the responsible parties in the concern, and control all the decisions.

Would you assign to us a note which we are informed you hold against Lovell & Lattimer. We have no hope of collecting it out of them; but to control them in an unsettled between L. & L. and Mr. Norwood.

Please inform us how you hold this property. if in fee, and from whom you derive it; if from your deceased husband, do you hold it by will or was he intestate? This information we should have, so that we may know that we get a good title in exchange for our money. We would say Mr. Poole has just returned from the South; he finds it a very hazardous, arduous and expensive undertaking, such as no lady should undertake. If you go, take this city in your route and learn our standing and responsibility.

Yours, truly,

J. MORTON POOLE & CO.

Defendant's counsel put in evidence exemplified copies of the petition and order of the surrogate of county of Cortland, New York, appointing the plaintiff administratrix of the estate of Cyrus Graves, when the court held that the appointment of the plaintiff as administratrix in the State of New York was not essential to give her authority to sue in this action, and suggested that whatever questions were to be raised on the authority of the plaintiff to sue as administratrix be reserved until the close of the case.

Defendant's counsel then read in evidence the deposition of WILLIAM G. NORWOOD, taken on notice on the 18th day of August, 1873, as follows:

I am 43 years of age. J. Morton Poole & Co. were my partners. Some time in the summer of 1865, in July, I wrote to Mrs. Graves, the plaintiff. We bought the unexpired term of the lease of Lovell & Lattimore, lessees, until January, 1866. The result of a number of letters passing between Mrs. Graves and ourselves was a refusal to lease the mill, but granting permission to us to occupy it until some arrangement could be made as to selling the property, as she did not desire to lease, but to sell it.

In March, or early in April, 1866, I visited Mrs. Graves, near
71 Thomasville, at which interview I stated to her that it was necessary for us to know how long we could occupy the mill, or whether we could lease it, or conversation to that effect; during the interview she declined renting the property to us, stating that we could continue to occupy until further notice. She complained of J. Morton Poole & Co. not having carried out in good faith their trade made in regard to the mill, she saying that they had agreed to purchase the mill of her at \$5,000, to which I replied there must be some wide misunderstanding between them, as I could not understand why they had offered her so much more than I had informed her than was the value of the property, and that, according to our copartnership agreement, they had no right to make such a purchase without my approval, which I had never given. I further told her that we were ready to purchase the property at a reasonable figure, on which she offered the mill for four thousand dollars, and the dwelling house for \$300. I declined purchasing the mill at that figure, but was to write her on reaching home further about the house. I did not accept the offer.

About the middle of April, (16th I think,) 1866, I found a notice stuck up on the mill, offering it for sale, to perfect the title to J. Morton Poole & Co.

Witness produced the original notice, and it is as follows:

Notice.

GEORGIA,

Thomas County:

Agreeable with an order of the honorable court of ordinary of said county, will be sold, at the residence of C. S. Graves, deceased, known as the Steam Mill Place, in Clinch County, State aforesaid, the steam mill and fixtures thereto, the property of said deceased. Sold to perfect a title to the same to J. Morton Poole & Co., in accordance with the terms of a private sale made to said property with them.

Terms cash.

April 16th, 1866.

JENNIE L. GRAVES,
Administratrix.

Some 30 days after I saw the notice stuck up on the mill, a person appeared who offered the property for sale, at which sale there were no bidders, and the property was withdrawn. I was present when it was offered for sale. I did not bid for it myself. No one else bid for it. There were no bidders for the property, and of course it was not knocked off to anybody. We continued to operate the mill under the previous permission until about the 1st of November, 1866, and this occupation was not in pursuance of any contract of sale, but was in pursuance of

the conversation I had with Mrs. Graves, as previously testified to. At the time the property was offered for sale I was the only person representing the firm of J. Morton Poole & Co. in Georgia. About the 1st of November, 1866, I mailed a letter to Mrs. Graves, stating that we had ceased to operate the mill. (A copy of the letter being annexed, marked Exhibit B.) On November 28, 1866, I mailed to her a copy of my letter of November 1st, urging a reply to the same. (A copy of that letter annexed, marked Exhibit C.) On December 5th, 1866, I wrote to Mrs. Graves, referring to letters Nov. 1st and 28th. (A copy of which being also annexed, marked Exhibit D.) No answers were received to any of these letters. I left Homerville on the 1st day of January, 1867. I have not seen the mill since.

The letters annexed to witness' deposition, Exhibit B, dated Nov. 1, 1866, Exhibit C, dated Nov. 28, 1866, being here given in evidence by defendant's counsel (being the same letters, of those dates, already in proof), and Exhibit D, dated Dec. 5, 1866, being as follows:

EXHIBIT D.

HOMERVILLE, December 5th, 1866.

Mrs. J. L. GRAVES,
Cincinnati, New York :

We wrote you under date of Nov. 1st and Nov. 28th (sending copy of Nov. 1st), stating that we had ceased to operate your mill at this place, proposing to pay any reasonable rent, and desiring you to appoint an agent to whom we can turn over your property, settle rents, &c., since which we have heard nothing from you. If we do not hear soon we will vacate the premises. Dr. Mathas has sold the lots on which the stables and outbuildings are situated, and demand possession of us, and has already taken the blacksmith shop and buildings which we erected under the plea that the property has ceased to be used for the purposes intended. We cannot prevent him, as we have no copy of your agreement.

Yours respectfully,

NORWOOD, PORTER & CO.

On a cross-examination the witness deposed:

I operated the mill interest in connection with J. Morton Poole & Co. up to about the 1st of November, 1866. I am certain we had ceased by that date. I estimate the value of the repairs and improvements we put on the mill at \$1,200 to \$1,300. These repairs were principally made prior to January, 1866, being necessary to put the mill in a condition that we could use it at all. That was done while we were occupying it under the assigned lease of Lovell & Lattimore. That we understood expired Dec. 31, 1865. I never saw that lease. We took the assignment with the understanding that the lease could be extended for another year, but we took no guarantee to that effect. We did not do much repairs on the mill after January 1, 1866, more than to keep the mill in running order.

July 1st, 1865, I wrote Mrs. Graves. (Letter annexed to deposition. Exhibit E, ante, fol. 231.)

Then my arrangement with J. Morton Poole & Co. had been talked over, but not quite matured. It had been, and we had entered upon business before Mr. Poole's visit to Homerville.

I received a letter from Mrs. Graves, in which she declined to lease

but expressed her readiness to sell the mill. (Letter annexed to deposition, Exhibit F, ante, fol. 234.)

Q. Did you, after receiving that letter, request your partners,
73 J. Morton Poole & Co., themselves to open a correspondence with her for effecting a renting or purchase of the mill?

A. I did.

I knew J. Morton Poole & Co. did open such correspondence with Mrs. Graves from written information from them, and that they received letters from her on the subject of renting or purchasing the mill. They did not forward her letters to me. I am under the impression that they sent me extracts from her letters, but no originals.

Q. Was the letter you wrote to her written in the interest of yourself individually or of your firm?

A. Of the firm.

Q. In April you say you saw Mrs. Graves in Georgia?

A. March or April.

Q. Where was she when you first saw her at that period?

A. Near Thomasville.

Q. Was it not at Homerville on the train as she was passing to Thomasville, and while the train was on its pause at Homerville?

A. I have an indistinct recollection of having seen Mrs. Graves passing Homerville, but do not recollect having any business communication with her, or, if so, don't recollect what it was.

Q. Did not Mrs. Graves there at Homerville inform you that your firm had bought of her this mill for \$5,000, and that she was then on her way to Thomasville to perfect the sale on her part by having an order from the ordinary to sell at public outcry to your firm, and did she not then request you to come up to Thomasville to see to the business with her, and did you not then and there tell that you would come up, and did you not accordingly come to Thomasville agreeable to your promise?

A. I have no recollection of the substance of any conversation had with Mrs. Graves at Homerville, and did not go to Thomasville in consequence of any conversation had with her; I did go to Thomasville and saw Mrs. Graves; I frequently went there to buy provisions.

A. Did you not go to the ordinary, H. H. Tooke, at that time and converse with him upon the subject of granting Mrs. Graves an order to sell this mill to your firm?

A. I at some time went to see Mr. Tooke to get copies of all the orders of court with reference to the estate of Mr. Graves, with a view of ascertaining whether Mrs. Graves could make a legal title to the property in question, but did not, according to my recollection, make any inquiry about future orders.

Q. Are you prepared to swear positively that you did not yourself, while Mrs. Graves was in Thomasville, go to the ordinary and request him to give Mrs. Graves an order for selling the mill at public outcry for the purpose of perfecting a title to it to your firm?

A. I am.

Q. At Thomasville did Mrs. Graves claim to you that your firm, through your partners at Wilmington, had purchased this mill or had agreed to purchase it at the price of \$5,000?

A. She told me that J. Morton Poole & Co. had so done.

Q. Did you suggest a lower price than \$5,000, and in reply
74 thereto she say that it was too late to change the price, as the bargain had already been made and the price agreed to at a time when she could have sold to others at the same price?

A. No.

Q. Will you swear positively that such a conversation in substance did not occur between you and her?

A. A part of it did. Upon my informing Mrs. Graves that I came to ascertain upon what terms we could continue to occupy the mill, as the time had arrived when we must have something definite understood, I asking her what rent she would be willing to take for it, she replied in substance that she had already contracted to sell the mill to J. M. Poole & Co. for \$5,000, and that they had treated her very badly concerning it, as they had prevented her making sale to other parties, upon which I told her that there must be some wide misunderstanding in regard to the matter, as J. M. Poole & Co. could not, according to our partnership agreement, purchase the mill without my approval which I had not nor would not give at such a price. That I considered \$2,500 or \$3,000 a full price, and that we were willing to purchase it at a fair price; upon which she either offered it at \$4,000 or asked me whether we would not give \$4,000; I am not positive which, but I considered it an offer—which price I positively declined, after which she told me that we could continue to occupy it.

Q. Did she not then say to you that her business to Thomasville was to do on her part all that could be required of her for perfecting a title to the mill on what she claimed to have been a private agreement on the part of your firm to purchase it of her?

A. I have no recollection of such a conversation, though as the subject of the conversation was the mill, such a conversation may have taken place without my recollecting it.

Q. Are you prepared to testify that she did not in that conversation so claim and state to you?

A. I am not. There is no relationship between me and my partners in the mill business. I never saw either member of the firm of J. Morton Poole & Co., prior to June, 1865. I saw J. M. Poole in Wilmington and in New York, in June, 1865, to make arrangements with him to furnish me with capital to go into business—that of manufacturing and selling pine lumber in Georgia.

Q. Returning now, I ask you to state, Mr. Norwood, whether Mrs. Graves did not in her conversation with you at Homerville or at Thomasville, in March or April, 1866, claim and state to you that she had made a private bargain for the sale of her mill to J. Morton Poole & Co., and that to perfect that sale by one at public outcry, she had come to Georgia at that time?

A. She did not. My answer to the question as a whole is that she did not. She may have mentioned that she came to Georgia to carry out a sale made to J. M. Poole & Co., but said nothing about a sale at public outcry.

Q. The sale to them which she mentioned was of the mill, was it not; and at the price of \$5,000, as you have previously stated, was it not?

75 A. My understanding at all times when speaking of the value of the property was for the mill and house. That is prior to the offer which she made me at Thomasville, up to some period in 1866, not recollected. I considered the house, as other buildings on the premises, belonging to the mill, or being part and parcel of the same property, as it was being occupied by us, and in no communication I now recollect of did Mrs. Graves mention a separate price for the house.

Q. Returning, now, again to your conversation had with Mrs. Graves at Homerville and at Thomasville in March or April, 1866, I ask you to state distinctly whether she did not then claim and say to you that she

had contracted to sell the mill to J. Morton Poole & Co. at and for the price of \$5,000?

A. At Thomasville she did.

Q. Coming now to the time when, as you have said, a man made appearance at Homerville to sell the mill at public outcry, in pursuance of the previously given notice, a copy of which you have produced on your direct examination, and at which offer of sale, as you say you were present, I ask you, Mr. Norwood, to state whether you did or not take any part in the proceedings had for that sale, or, as you say, attempted sale?

A. I did not, unless when upon the reading of the notice by the person referred to, while he was standing upon a stump when he read the words "on the premises," I jocularly asked him whether he knew he was on the premises, remarking that I had not been able to find out what the extent of the premises were, or words to that effect. Unless that may be considered so, I took no part in the sale or attempted sale.

Q. You mean to say, then, that you said or did nothing in such sale or attempted sale more than to make such jocular remark, from first to last, do you?

A. I do. I mean nothing that could be construed as having any relation to the sale or attempted sale?

Q. Did you, or do you, know the person who acted as agent or crier at such sale, or, as you say, attempted sale?

A. I did not and do not.

Q. Who do you remember to have been present, other than yourself and such agent or crier, at such sale or attempted sale?

A. Daniel H. Stewart and James C. Cooper are the only persons I am positive were there. There was a number of other persons present; Mr. Stewart is now dead; Mr. Cooper resides in Savannah. I have seen and conversed with him on the subject of that attempted sale since the commencement of this action.

Q. State now, Mr. Norwood, whether you, in connection with J. Morton Poole & Co., continued to operate the mill in question after such sale, or, as you say, attempted sale, at public outcry?

A. We did.

Q. State further when your connection with said firm of J. Morton Poole & Co. in operating said mill ceased, giving the date, as near as your memory serves you.

76 A. We ceased to occupy the mill in October, 1866. I continued on premises, winding up the business, until January 1st, 1867, at which time my connection with the firm ceased, except collecting some unsettled claims for the firm.

Q. Who were the money contributors to the business done principally; you or your partners at Wilmington?

A. My partners at Wilmington.

Q. How long is it since you have last received from them or either of them any letter or communication?

A. Probably about three months.

Q. You have presented here one, as you say, of the posted notices of the sale made, or attempted to be made, of this mill at public outcry at Homerville; now explain, Mr. Norwood, why, if that sale was withdrawn or abandoned, you were at the pains of preserving one of such notices?

A. Because the attempted sale, in such a manner, led me to suppose that there might be litigation about the matter, and as I had been legally informed, or rather was informed, that such sale was not legal,

and the notice itself being, or appearing, informal, and the time of attempted sale after notice, caused me to preserve it as evidence in behalf of my partners.

Q. But you have said, have you not, the sale was by the crier or agent conducting it expressly withdrawn?

A. I said or meant that there was no sale, the crier leaving the stump without announcing a sale, there having been no formal postponement or withdrawal of the property.

Q. You understood, then, that the sale was abandoned, did you?

A. I did.

Q. Why, then, if you understood the sale at public outcry to have been abandoned, did you conceive it possible that any litigation could arise over or in relation to it?

A. I did not suppose any successful litigation could.

Q. You still say that you preserved one of the posted notices of the sale in anticipation of litigation; what led you to think, if the sale was abandoned, anybody would commence litigation based upon it?

A. Not in anticipation, but as a result that might take place, which I inferred from having heard from J. Morton Poole & Co. that Mrs. Graves insisted on their paying her an amount which she claimed they had agreed to pay her, and from the fact that after they had denied having made such purchase she persisted in making this claim on them.

Q. Do you mean that the company requested you to preserve such posted notice?

A. I do not; I did it of my own accord.

Q. Had any correspondence, by letter or otherwise, passed between you and the company after you first saw these notices of sale posted and before the time appointed for the sale?

A. I think I advised them of the notice having been stuck up on the mill, by letter; to which I received no reply until after informing
77 them of the result of the attempted sale; or, if any such reply was received, I do not now recollect it.

Q. Then, Mr. Norwood, I understand you as testifying that you preserved one of these posted notices of sale, not by request of your company, but on your own motion. You testify, at the same time, that you understood the attempted sale, pursuant to such notices, was abandoned. How, then, did it occur to you that it was important or necessary, in any view, or for anybody's interest, to preserve one of the notices of such abandoned sale. Can you make any further explanation than the one already given? If you can, please make it.

A. As a prudential course, which would lead a business man to preserve any document or paper having reference or at all connected with his business affairs.

Q. Do you desire, or can you make any further or other explanation for the pains you took to preserve one of such notices than that now already given?

A. I cannot; I do not desire.

Defendant's counsel read the notice and letters referred to in Norwood's deposition, and annexed thereto, so far as not already in proof.

EXHIBIT H.

HOMERVILLE, Sept. 27, 1866.

Mrs. J. L. GRAVES,
Cincinnati, N. Y.:

MADAME: As Norwood, Porter & Co. have never been able to effect

any arrangement with you for the rent of your mill and the house in which I am living, I desire to come to some definite understanding with regard to the house. I will only occupy it until the 1st of January next, and wish to arrange the amount of rent (which I will pay individually); please to say to whom I shall pay it.

What will you rent the house for the next year at?

Do you wish to sell the house, and what is your price?

Very respectfully,

W. G. NORWOOD.

Defendant's counsel then read the deposition of JAMES C. COOPER, taken on notice at Savannah, on the 19th day of August, 1873, who testified as follows:

I am 39 years of age, and am a policeman in Savannah. In 1866 I resided in Homerville, Clinch Co., Georgia. (Witness is shown the notice of sale produced by Norwood, and he says:) I have seen it before, at the time I resided at Homerville. Two or more notices such as that were put up there, one on the saw-mill that was in Homerville, the only one there.

78 Q. Do you or not know whether the mill upon which the notice was put up was offered for sale pursuant to the notice?

A. It was; I do not remember exactly. It was some time in April. I was present.

Q. How many bids were made?

A. There was only one that I heard, and that was by a man by the name of Daniel Stewart.

Q. Was the mill sold?

A. I never heard that it was; it was my impression that it was not. I was acquainted with William G. Norwood; he was present when the mill was offered for sale.

Q. State whether or not he made any bid for the mill?

A. I did not hear him make any.

On his cross-examination he testified: I was then and continued to be in the employ of the company then operating the mill. Mr. Norwood was the managing partner at the mill. I had charge of the teams and logs at the mill. I continued so until they shut down some time in the year 1866. I believe in the fall. I had no interest, and did not attend the offered sale with a view of purchasing the mill. I did not know the person who officiated as crier. Mr. Stewart kept a small grocery store in Homerville, he is now dead, he was between 50 and 60 years old, I think. He was much older and a shorter man than Mr. Norwood, and did not resemble him in any respect. Mr. Norwood was present at the sale, but whether he was at the time I heard this man call out his bid I cannot say. There were several other persons there, but I cannot mention their names, unless John Hodges or David Smith were there.

Q. Can you remember what the statement was which was made by the person offering the mill for sale?

A. He asked for a bid the same as any other man would in offering property for sale. That is all I remember about it.

Q. Do you remember, at this time, the words or the language he employed so as to repeat them or the substance of them?

A. I could not. It was about May, 1873, that my attention was first called to what occurred at the offer of the mill for sale. Of course I did not at that time think anything more about it, but I remember it well; I could not say I had forgotten it altogether; I could not state

everything that was said. It was Mr. Norwood who called my attention to remember about it in May, 1873.

Redirect:

In anything I have stated positively, I am sure of my recollection.

Recross:

I have stated that I do not remember accurately all that was said and done at the time the mill was offered for sale, and I stand by it still.

Defendant's counsel then read the deposition of WILLIAM L. BASSINGER, taken on notice at Savannah on the 21st day of October, 1873, as follows:

I am 46 years old; I have been practicing law in the city of Savannah since 1851. In the fall of 1865 or spring of 1866 (I do not remember when the matter commenced) I was consulted by J. Morton Poole & Co., of Wilmington, Del., and by Wm. G. Norwood, of Georgia, with regard to some questions of title to a steam saw-mill either in the possession of Mrs. Graves, as administratrix of her husband's estate, or claimed by her as part of the estate. My communications with J. M. Poole & Co. were in writing. Those of Mr. Norwood were partly oral and partly in writing. All my letters, books, and other papers were destroyed in January, 1869, by a fire which consumed my office and all its contents. I can therefore testify only from recollection, almost entirely unaided by any written memoranda to which to refer. I have, however, an original letter from myself to J. Morton Poole & Co., dated March 31st, 1866 (which is hereto attached). According to the law of this State, the same then as now, a private sale by an administrator, under an obligation to perfect by legal formality, was contrary to public policy and voidable at the option of any party interested. A section of the Code of Georgia, number 2566 in the new edition, 2525 in the last, so declares, as to such private sales of land by an administrator, and I understand the supreme court of Georgia, in the case of Nutting vs. Thomasson, published in 46th Georgia Reports, commencing at page 34 (in which the firm of which I am now a member was of counsel), to have extended the principle to similar sales of personal property. Indeed the rule as stated in the case with regard to land was first announced by the same court in 22 Georgia, 37, before the adoption of the code.

Defendant's counsel then offered in evidence the following letter, annexed to the deposition of W. S. Bassinger, dated Savannah, March 31st, 1866:

Messrs. J. M. POOLE & Co.,
Wilmington, Del.:

GENTLEMEN: I have a letter to-day from Mr. Tooke, of Thomasville, the ordinary of that county, on behalf of Mrs. Graves. It takes the position that you have concluded an agreement with her to purchase her mill for \$5,000, and asks what proceedings I want taken to secure you a proper title. I have replied that I must hear from you again, as I had not understood that you did in fact conclude the bargain. Therefore please let me hear from you on the subject. There seems to be no doubt that the mill belongs to her husband's estate. Mr. Norwood so informed me. But he says the mill is not worth half the money at the outside.

I remain, very truly yours,

WILLIAM S. BASSINGER.

The plaintiff's counsel objected that the same was incompetent and hearsay. The court sustained the objection and excluded the evidence; to which ruling defendant's counsel duly excepted.

80 The defendant's counsel then read a portion of the deposition of EDWARD PUSEY, taken upon notice at Wilmington, Del., on the 3d day of October, 1873, as follows:

I am forty-two years of age. In December, 1865, at the request of William T. Porter, I went to Cincinnati, New York, to see Mrs. Graves about renting a steam saw-mill in Clinch County, Ga., at or near Homerville. I found her almost impracticable on the subject of renting, she desiring very much to sell the property. But after some persuasion or argument on my part she finally made a proposition upon which she would lease the mill to J. M. Poole & Co. I think she also made a proposition to sell to the same parties. I closed nothing with her, but brought the propositions to Wm. T. Porter. Mrs. Graves stated to me that she intended to visit the property in Georgia at any early day, and consulted me as to the route she should take.

Cross-examined:

She made propositions both to sell and to lease the mill and fixtures in one proposition, whether in writing or not I can't say. I think I brought home with me her terms for selling.

The defendant then called WM. T. PORTER, who, being duly sworn and examined as a witness in his own behalf, testified:

I reside in Wilmington, Delaware. I am a member of the firm of J. Morton Poole & Co. That firm was organized May 24, 1863, and consisted of J. Morton Poole and myself. I met Wm. G. Norwood once at Savannah in 1865. That is, I met him several times in one week. I have a younger brother, James B. Porter; he was not in business in 1865. Part of my business in going South was to get him into business. The projected business was sawing lumber. He and Norwood were to run a mill there. Norwood was then in treaty with Lovell & Lattimore to get this lease. We were to furnish the money, and the firm in Georgia was to be Norwood, Porter & Co.—the 30. represented J. Morton Poole & Co. I never went into the interior where the mill site was. We corresponded with them from time to time.

Q. Did you ever know of a sale having been effected in Georgia, or of a purchase of this saw mill on your account?

A. No; I never knew. The first time I saw Mrs. Graves, she came to Wilmington, I think in the fall of 1868. (It was admitted that this action was commenced about March, 1872.) I was served with process in New York City. I was in the habit of coming on frequently to New York City on business for 15 years; more frequently from 1868 to 1872 or 1873; during that time I came three or four times a year—sometimes oftener—and sometime I would pass right through. Other days I would stay a day, or two or three days. The person who served me was Mr. Legg, a detective at the depot at Wilmington; he followed me from Wilmington to New York. I never heard of a suit being contemplated prior to the commencement of this action. The last letter we received from Mrs. Graves has been read here. Our firm is regular in its manner of keeping track of correspondence. It has a business some years amounting to \$200,000. We kept letter-press copies
81 of our letters and files of those we received. The senior member of my firm is 66 years of age; he is not able to travel; his health is very poor, and has been for several years.

Cross-examined :

For the last three years he has not been away from home three days ; he attends to business very little now ; at the time of this correspondence he wrote all the letters ; the letters received were always opened while we were all present ; at times we can't all be present ; when we are at home they are opened in the presence of the whole ; we never received any letter from Mrs. Graves after she says the mill was sold at public outcry ; I can't say my partner did not ; I say we never did that I know of.

I say I did not expect to be sued when Mrs. Graves came to Wilmington ; that Mrs. Graves, had never intimated suing me at that time ; Mrs. Graves came to Wilmington in 1863 or 1867, with Mr. Foster ; I did testify in the former trial that I then asked her if she intended to turn it into a lawsuit ; he came down and had me come up to the Indian Queen Hotel ; Mr. Pusey came with me.

Q. And didn't she then demand of you this \$5,000 ?

A. No, sir, never.

Q. Didn't she insist then that the mill had been sold to J. Morton Poole & Co.

A. She did not.

Q. Didn't she claim anything of you ?

A. Yes, sir.

Q. What was it ?

A. Her expenses to Georgia and back.

Q. That was all ?

A. That was all.

Q. How came the question of a lawsuit to be raised ?

A. I raised it ; on going into the room with Mr. Pusey, I asked if the intention was to make a litigation of this saw-mill affair.

Q. In what sense had you an idea that could be done ?

A. Well, Mr. Foster had been down talking to us two or three hours about this very matter.

Q. Didn't he insist that she had gone to Georgia and sold the mill at public outcry there ?

A. No, sir.

Q. You didn't understand it ?

A. No, sir.

Q. Do you say that, sir ?

A. I do, sir.

Q. Do you say that they came there and neither one of them, during their interview, intimated or claimed to you or communicated to you the fact that this mill, about the 30th of April, 1866, had been sold at public outcry and bid off by J. Morton Poole & Co. through Mr. Norwood ?

A. Neither of them insisted so ; neither of them said so.

82 Q. You say all that Mr. Foster claimed or Mrs. Graves claimed was simply to pay her expenses from Courtland Co., down to Georgia, in the spring of 1866 ?

A. Yes, sir.

Q. On what ground did they claim those expenses ?

A. I don't know anything about their ground.

Q. Oh, yes you do.

A. Not a bit.

Q. On what ground did she base that claim ?

A. I don't know.

Q. Do you say before this jury that you did not understand on what ground she claimed that?

A. I do decidedly say it before this jury and before the world.

Q. I notice that you have lost an arm; that wasn't in the service of your country?

A. No, sir, it was lost in business.

Q. You do not deny that at that period of time, Mr. Poole, your partner, had, in the spring or winter of 1866, or in the fall of 1865, been South and been to Homerville?

A. He had, in 1865; latter part of 1865, in December or November.

Q. Do you deny that you and he were partners?

A. No, sir.

Q. Do you deny that Mr. Norwood was a partner with you in this business at Homerville?

A. No, sir.

Q. Where is your brother?

A. Either in Charleston or Orangeburgh, S. C.

Q. Where is Norwood?

A. I think in Savannah; am not certain.

Re-examination:

(Showing witness exemplification of proceedings in the estate of Graves certified by H. H. Tooke, January, 1866:)

Q. Do you recollect having those in your possession?

A. They were sent to us by Wm. G. Norwood. We sent them to you.

(The attention of the court was not further called to these papers or their contents.)

Defendant rests.

The plaintiff's counsel then read the deposition of CHARLES FOSTER, taken conditionally, October 29th, 1873.

I am an attorney at law, and 50 years of age; I reside in Courtland Co., New York; I went to Wilmington, in September 1867, with the plaintiff. I saw Mr. Poole at his house, and Mr. Porter and Mr. Pusey at the Indian Queen Hotel. I first called at the furnaces and saw Mr. Porter, who referred me to Mr. Poole, who was then indisposed at his house. I called on him and had a lengthy conference with him; Mr. Porter called with Mr. Pusey in the evening, and they and the plaintiff and myself had an interview in the parlor of the hotel. All four participated in the conversation. The substance of that conversation was that the plaintiff claimed that the defendants owed her \$5,000 for a steam saw mill which she had a right to sell them as administratrix, and that she had sold them that property through Mr. Pusey; and there was some conversation about some correspondence—the particulars of which I can't state. Porter denied any liability on the part of himself or his firm, stating that the property had been purchased in behalf of Mr. Norwood. That he, Porter, and his firm had nothing to do with it, except that they had assisted Norwood as a friend or as a relative. I am not clear about his being claimed to be a relative, but that is my impression. Mr. Porter claimed that he had no knowledge of any contract being made about the mill, and that he would not pay a cent. She claimed that they had purchased the mill and had been in possession. I argued that they ought to pay something for the use of the property if they did not pay her for it; that was mentioned in the way of a suggested compromise by me, but I claimed they owed

her for the property. That was about the close of the interview. Mr. Porter was standing up squarely before me and Mrs. Graves, and said to Mrs. Graves: "I won't pay a damned cent." He based his refusal on the ground that they had not contracted for it, nor had it.

Q. Do you remember, Mr. Foster, that she complained to Mr. Porter that she had been unfairly treated in the course that they had taken, and particularly in refusing to pay for the mill and the trouble she had taken to perfect title?

A. I remember she complained that they had not used her well after putting her to the trouble and expense about the property. I think a portion of that trouble and expense was in her having been to Georgia.

The plaintiff's counsel then read the following question:

Q. Did the plaintiff make any claim for the money she had expended in going to Georgia to perfect title of the mill for the defendants, or the purchaser or purchasers whoever they were? I mean did she make the return of such money a claim which she had come to demand of them?

(The defendant's counsel objected to the question; immaterial, irrelevant, and incompetent. The court overruled the objection and defendant excepted.)

Q. Did you make any such suggestion?

A. In the talk with them when I found that they would not pay, I endeavored to get them to make some offer by way of settling, and said to them that they ought at least to pay Mrs. Graves all the expense she had been at in negotiations, and going to Georgia in reference to the title; that suggestion was refused.

Cross-examined:

Before I left for Wilmington, I was employed by Mr. Goodrich, on behalf of Mrs. Graves, a few days before I started. I can state
84 nothing further that Mr. Porter said he claimed that no sale had been perfected.

The plaintiff's counsel recalled Jennie L. Graves, who further testified, I remember, the occasion of being with Mr. Foster at Wilmington. In that interview I said to Mr. Porter, I have come down here to see you in regard to the mill. When Mr. Porter first came in he says, "Mrs. Graves, your attorney has been around to see us; he wants us to pay for that mill. Mr. Poole is sick and I have come around to tell you that we don't owe you anything, nor shall we pay you anything." I said, "Mr. Porter, I don't understand it so. I think it is due me that you should make some explanation. I think you owe me for that mill. I have sold it to your firm. Mr. Norwood was present at the sale and bid it off, and it was at his special request that a public sale was made." He said, "if you have got any claims against Mr. Norwood why you must look to him for it." I said, "Mr. Pusey represented to me that Mr. Norwood was a partner. And now you call upon me to go to Norwood. I have come to you." "Well," he says, "I have nothing to say to you, only what I have said; I can repeat it; that is, we don't owe you a cent, nor shall we pay you." I said, "Mr. Porter, I would like to know why you say so; give me your best reasons." I asked him if I hadn't perfected the sale, and he said he supposed he was getting the land. I said, "Mr. Porter, how much land?" And he rather sarcastically said, "a thousand acres." I said, "you never could have got that idea from me that you were to have a thousand acres of land with the mill, for I didn't own but an acre of land in the State, and that I have always stated that was the land that the house stood on that Norwood occupied." "Well," he says, "there is no use talking; my errand here is to say to you what I have

said," and said he, "you are down here with your attorney." I said, "I am down here in company with Mr. Foster. He has stopped off with me. He was going to Washington; the gentlemen that I expected to have was unable to come." "Well," said he, "he has been around to see me, and I think I understand it." I said, "Mr. Porter, all I ask of you is to pay me for the mill, and there will be no attorneys brought into question. I don't want any further trouble; I have had plenty of trouble." He said, "Well, bring on your attorneys; I ain't afraid of the worst you can do." Said I, "Mr. Porter, you are a gentleman of large business here, and to me it seems cruel that you should deny these claims. I don't see how you can do it." "Well," said he, "my errand is done." This conversation was at the hotel in the evening.

Q. State whether you, on that occasion, made any claim or stated to them that you wanted pay for your expenses to Georgia, when you went down to close up the purchase?

A. No, sir, I did not.

Q. At the time Norwood came to Thomasville, did he make any statement to you there that he wouldn't give \$5,000 for the mill, and objected to the firm offering you \$5,000?

85 (Objected to as leading and improper. Objection overruled. Exception taken by defendant's counsel.)

A. No, sir.

Q. Did you offer there to take \$1,000 or any other price than the \$5,000 for the mill?

(Objected to by defendant's counsel as incompetent and leading. Overruled. Defendant's counsel excepted.)

A. I did not.

Q. Was there anything there in that interview between you and Norwood from first to last, there, at Thomasville, said by you that he or his firm could continue to occupy the mill otherwise than under a purchase, until you should further advise them when you got home?

(Objected to as incompetent and leading. Objection overruled. Exception taken by defendant's counsel.)

A. No, sir.

Cross examination by defendant's counsel:

Q. When was the interview at the Indian Queen hotel in Wilmington?

A. I think in October, 1867. I had consulted counsel with reference to my claim prior to going to that interview; I had consulted Mr. Goodrich. I understood that Mr. Foster accompanied me as attorney. After that interview I consulted counsel with reference to bringing an action upon this claim. I consulted Mr. Sedgwick, of Syracuse, and Mr. Dougherty, of Philadelphia; nobody else. I never consulted counsel in Georgia about suing Mr. Norwood on this claim. I understood J. Morton Poole & Co. were responsible parties. In the interview at Wilmington I never made any claim for my expenses in going to Georgia and returning. Mr. Foster may have done so. I can't say he did not. Mr. Pusey was present during the entire conversation. I was present at the examination of Mr. Foster. I was not present at the examination of Mr. Pusey.

Redirect:

Mr. Norwood was not responsible.

WM. T. PORTER recalled and further cross examined by plaintiff's counsel:

I was sworn and examined as a witness on the former trial.

Q. Upon your examination there were you asked by your counsel this question: "What were the arrangements between your firm and Norwood in regard to the purchase of the mill?" and did you make this answer: "If we bought the mill we expected to pay for it and hold it in our own name?"

A. Yes, I think I made that answer.

The plaintiff's counsel then presented a computation of interest at 7 per cent. Defendants' counsel claimed that no more than 6 per cent. could be recovered in this court.

86 Plaintiff's counsel then offered in evidence § 2050 of the Code of Georgia of 1873. Defendant's counsel objected that it was enacted after this cause of action arose.

The court admitted the section and defendant's counsel excepted.

Plaintiff rests.

Defendants' counsel then read in evidence from the deposition of EDWARD PUSEY, as follows:

I next saw Mrs. Graves at the Indian Queen Hotel, in Wilmington, where I went at the request of Wm. T. Porter. She had a gentleman with her whom I supposed to be an attorney. One of the first questions asked at that interview by Wm. T. Porter, who went with me, addressing Mrs. Graves, was whether she intended to make a lawsuit out of it. I mean this mill matter. She disclaimed any such intentions. The object of the conversation seemed to be to get money, basing her claim upon the fact of her having had to visit Georgia on account of this business. I said to her, that she had told me at the former interview, that she had intended visiting Georgia anyhow. She made no reply. During the conversation she said she had been badly used, and addressing herself to Wm. T. Porter, said, you ought to give me some money. I don't remember the exact words. Mr. Porter replied, that he owed her nothing, and most certainly did not intend to pay her anything. This is all I remember that occurred.

Defendant's counsel read in evidence §§ 2179, 2180, 2191, 2639, 2523, 2526, 2529, of the Code of Georgia of 1873, corresponding to §§ 2153, 2154, 2165, 2597, 2484, 2486, 2490, of the old code.

Defendants counsel also read in evidence the case of *Neal vs. Patten*, 40 Georgia Reports, 369. *Southwestern R. R. Co. vs. Thomasson*, 40 Ga. R., 409. *Graham vs. Theis*, 47 Ga. R., at p. 479. *Nosworthy vs. Blizard*, 53 Ga. R., p. 688. *White vs. Crew*, 16 Ga., at p. 416. *Adams vs. Babbit*, 5 Ga. R., 415.

Defendant rests.

Plaintiff's counsel read in evidence §§ 2237, 2218, 2192 of the Code of Georgia, of 1873.

Plaintiff's counsel put in evidence the cases of *Oglesby vs. Gilmore*, 57 Georgia Repts., 55.

Plaintiff rests.

The foregoing was all the testimony given material to the questions herein stated.

Defendant's counsel then requested the court to instruct the jury, that upon the evidence the plaintiff is not entitled to recover a verdict;
87 which ruling and instruction the court refused to make, and to such refusal defendant excepted.

Defendant's counsel also requested the court to direct a verdict for the defendant, which direction the court refused, and defendant excepted.

Defendant's counsel also requested the court to direct a verdict for the defendant, or instruct the jury that the plaintiff cannot recover in

her capacity of administratrix, nor can she recover in this action in her individual right; which the court declined to do, and defendant excepted.

Defendant's counsel also requested the court to charge the jury as follows:

1. That it now appears that any pretended sale in Georgia was void under the statute of frauds of that State, there being no entry made by a proper auctioneer at the time of sale. The court held that there was no proof of any entry at the time of the sale, but that it was a question for the jury whether there had been a delivery which would satisfy the statute of frauds. To which refusal and ruling defendant excepted.

That the possession of Norwood has been shown not to have been under any contract of sale.

(Refused & defendant excepted.)

Also that said pretended sale, being professedly merely a completion of the assumed previous private contract, and it appearing that there was no previous contract, there was nothing to complete, and the attempted sale had no force or validity.

(Refused & defendant excepted.)

That under the statute law of Georgia there was no valid contract between the parties, for want of a sufficient memorandum in writing.

(The court held that there was no sufficient memorandum in writing, but declined to charge as requested. To which ruling defendant excepted.)

That the attempted sale at public outcry to perfect a previous private sale is contrary to the law and public policy of the State of Georgia, and therefore void.

(Refused & def't excepted.)

That the private sale of the property in question being illegal, no concerted attempt by the parties thereto to validate it by the forms of a public sale under an order of the ordinary can be effectual.

(Refused & def't excepted.)

No agreement of the parties or united request on their part to secure a formal compliance with the law in aid of a previous illegal private sale will render the latter valid.

(Refused & def't excepted.)

The formal public sale of the mill made expressly to perfect a title to the same to the defendants in accordance with the terms of a private sale made of said property to them, is a mere form and an evasion of the statute, and hence illegal.

(Refused & def't excepted.)

88 That the jury is not authorized to find in the correspondence any contract binding on the defendants.

(Which the court charged.)

That the plaintiff cannot recover from the defendant anything in consequence of any loss of bargain or sale of the mill to other parties.

(Which the court charged.)

That the right of the plaintiff to recover depends on her establishing a contract between her and defendant for the sale of the mill at an agreed price.

(Which the court charged.)

That Norwood had no authority to bind the defendant by a purchase of the mill.

(Which the court refused to charge & def't excepted.)

That although a partner, Norwood's authority was limited, and the

limitation known to the plaintiff, and that any purchase of the mill by him being in excess of his authority, did not bind the defendant.

(Which the court refused to charge & def't excepted.)

That there is no evidence as to who owned the land on which the mill stood.

(Refused & def't excepted.)

Any erection, whether it be permanent or capable of separation and removal from the soil, is presumed to become affixed to the soil, and the burden of proof is upon the party claiming that it is not so affixed, to establish the fact.

(Refused, except as charged as appear, & def't excepted.)

The presumption is that as between heirs and the administratrix, the mill was real estate or land.

(Refused, except as charged as appears, & def't excepted.)

If considered as personal property, then the title vests in the administratrix as trustee for the heirs and creditors. (Code, § 2483.)

(Refused, except as charged as appears, & def't excepted.)

The sale by the administratrix, unless in the form prescribed by law, conveys no greater title than she has herself. (Code, § 2639.)

(Refused, except as charged as appears, & def't excepted.)

Charge.

The court charged the jury substantially as follows:

That this action is brought to recover of Mr. Porter, the defendant here, the price of a portable saw-mill.

That he could not be held liable unless a purchase of the mill from the plaintiff had been shown, and that, a purchase made by some person who could bind Porter in making it.

That it was conceded and not disputed here that he, Porter, and the defendants Poole and Norwood (not served with process), were partners in the venture of buying and running this saw-mill, or in whatever was done by them in respect to it; so that, if a bargain by Norwood for its purchase was included in what was done, it would be a bargain that bound Poole and Porter, the same as Norwood, and this because they were partners.

89 Generally, according to the ordinary use of the term, a "saw-mill" would be real estate; but it is not necessarily real estate. A portable, moveable saw-mill, not attached to the land nor intended to be, but put there for the purpose of being used, and moved when the use there is through with, would be personal property, and not real estate.

Now you have heard the evidence as to what sort of a piece of property this portable saw-mill was, and how it stood there upon the land, and how it was situated. If it was real estate, the plaintiff did not sell and convey it, and she cannot recover.

If the plaintiff's intestate, Graves, her husband, owned the mill and not the land it was on, and it was a moveable thing, and intended to be such, and not attached to the land, so but it could be removed without injury—substantial injury, to the land; and Norwood, as one of those partners, assuming to act for himself and the other partners, including Mr. Porter, agreed it was personal estate and should be treated as such in the sale from the plaintiff to them, and she, relying on that agreement, in good faith towards the interests of the estate, made this sale, then it would be a sale as of personal property. If it was personal property, and she in good faith towards the interests of the estate,

with honest, fair intentions towards the heirs and creditors of the estate, bargained with Norwood, he acting as such partner; and if, in pursuance to the bargain made and pursuant to the notices here in evidence, Thompson, for the plaintiff and by her authority, as auctioneer, on outcry at the time and place mentioned in the notices, struck off the property on Norwood's bid of \$5,000; if the plaintiff consented and did agree to sell, and through Thompson did make sale of the property to this firm, J. Morton Poole & Co., for \$5,000, in this public way; and if Norwood, for the firm, agreed to pay the \$5,000, and at that sale bid it off at that price, then that would make a contract of sale, and a sale.

It would make an agreement of sale; but not a perfected sale. It is agreed here that, at the time of the public sale which the plaintiff claims was made, the mill was in the possession of Norwood, and that he continued in possession of it afterwards. Now, if the plaintiff and Norwood agreed that he should continue this possession under this sale and purchase by him for the firm, and he did, after that, continue the possession under the purchase—she understanding and he giving her to understand that they were in possession under the purchase, and not under any other arrangement, and they did continue in possession afterwards as purchasers under that purchase, that would be a delivery under the sale, and if they held it for any length of time they would be bound to keep the mill and pay the price for it. It would be an execution of the sale, which would bind the firm to pay for the property; although afterwards they may have abandoned or offered it back to her.

Now, to find for the plaintiff in this case, you must find all these things. You must find there was this contract to sell and agreement to purchase, between Norwood and the plaintiff. That Thompson attended the sale (at outcry, that is claimed) as agent, with authority from the plaintiff to make it. That Norwood was there. And

90 that Thompson put up the mill at public outcry, and Norwood bid the \$5,000, and that the property was struck off on that bid. Then if you find that Norwood continued the possession of the mill (they were there at the mill when this transaction was had), that Norwood then took the mill, understanding, and giving the plaintiff to understand, that he took or continued such possession under that purchase, and he understood and she understood that he was holding it for the firm as purchasers, and he did so hold it for any length of time, then the mill was delivered to the firm and they became bound to pay for it.

I say to you that there was no sale of the mill agreed on between the parties prior to the plaintiff's going south in February or March, 1866. The negotiations that had previously passed, and which have been admitted in evidence, show that no bargain had been agreed on, and you are to look at such negotiations only to see what was the position of the parties up to that time, to enable you the better to see and understand exactly what took place between Norwood and the plaintiff after her arrival there, and to judge whether, in what passed between them at Homerville and Thomasville, after she came, there really was this sale and purchase of the mill agreed upon and made, which the plaintiff claims.

Now, if there was not this agreement between her and Norwood that he would attend and bid off the mill for the firm for the price of \$5,000, at the public sale mentioned, the plaintiff cannot recover. If the mill was not put up by Thompson, and struck off on Norwood's bid of the

\$5,000, she cannot recover. If, however, there was this agreement by Norwood to buy, and he did attend the sale and make the bid, and the mill was struck off upon it, and he took possession under the sale, then the plaintiff can recover. But if the firm did not have, did not keep possession under that contract of purchase, she cannot recover. If they merely dropped it right there and the whole thing was left, by the understanding of the parties, just as it was before, although Norwood bid off the mill, she cannot recover. If the firm kept possession of the mill as purchasers, that was a delivery of what they bargained for, and they had it, and the plaintiff can recover.

The case has been so fully and fairly discussed to you by counsel that it is not necessary that I should allude to the evidence in particular. I merely give you the points the case turns on. And I state the plaintiff must make out all these things. She must have shown you that the mill was personal property; that Norwood agreed to buy and to bid it off, and did bid it off, and that it was struck off to him upon his bid of the \$5,000 for his firm at that public sale, and that they took or kept possession of it under the sale. If she fails in any one of these things, she cannot recover.

If the plaintiff is entitled to recover, she is entitled to recover \$5,000, with interest at 7 per cent., from the 30th of April, 1866; that being the date of the sale, if one was made. By the laws of Georgia, which are to govern here, on the question of interest, the rate allowable is 7 per cent. If the plaintiff is entitled to recover at all, it is for \$5,000 and interest from the date, and at the rate stated.

You may take the case.

91 By a JUROR. The plaintiff cannot recover, if the mill was real estate, because of the form of the action?

By the COURT. No, sir; she has not sold any real estate; that would require a deed, which is not shown here to have been given. If the purchasers bargained for real estate, they did not get any.

The counsel for the defendant calls attention to that portion of the charge wherein the court says, in substance, it is conceded that whatever contract Norwood made would bind Porter. It is not conceded that Norwood, as a partner, had any agency to bind the defendants in the purchase of the mill; and I call your honor's attention to the letter of J. Morton Poole & Co. You have a request to charge that J. Morton Poole & Co. had given distinct notice that they were the parties in control of this whole matter.

The COURT. It is conceded in this case that, in this venture about that saw-mill, Norwood was a partner.

COUNSEL. In the business, but not in the purchase of this saw-mill; we except.

The COURT. Your point would be well taken if he was mere agent. He being a partner, she could deal as well with him as them, and if they notified her to stop dealing with him and deal with them, he might take it up anew.

COUNSEL. I think not; that is what I except to. I also desire to except specifically to that statement that it is conceded that whatever contract Norwood made with respect to the purchase of this mill, would bind Mr. Porter.

Also to the charge that there is evidence to that effect.

Defendant also excepts to the charge in effect that if Mrs. Graves, in good faith, made this arrangement with Norwood, and Norwood bid it off for the firm, then it would make a contract, under the laws of Georgia as proved here, which would entitle her to recover.

Also, I except to the portion of the charge where it is stated, in substance that his taking and keeping possession would be a delivery after the alleged sale.

Also, I except to that portion of the charge wherein the court states, in substance, that if Mr. Graves owned this land, and he put this mill upon it, so that it could be moved, it would be, as between this administratrix and his heirs-at-law, personal property, and not real estate.

Also, I except to the charge, that, if plaintiff recover at all, she may recover interest at 7 per cent.

And to the statement that the law as to interest, in Georgia, covers this case.

And, I except specifically as to each refusal of the requests submitted to the court, and each request refused, except as charged, and exception taken to each refusal.

92 The jury then rendered a verdict for the plaintiff for the sum of \$5,000, and interest, amounting to \$8,904⁴⁴/₁₀₀, which was duly entered.

Exceptions allowed and ordered to be made a part of the record.

HOYT H. WHEELER.

(Endorsed:) U. S. circuit court, north dis. of New York. Jennie L. Graves, administratrix, &c., vs. William T. Porter, impleaded, &c. Case and exceptions. Filed April 25, 1878.

Circuit court of the United States, northern district of New York, March term, 1878.

JENNIE L. GRAVES }
 vs.
 WILLIAM T. PORTER. }

This cause has been heard on a motion of the defendant for a new trial founded on alleged errors in the trial by jury at the June term, 1877.

The action is in substance what would be an action of assumpsit at common law for the price of a portable steam saw-mill and some attachments and utensils, as for goods sold and delivered to the firm of J. Morton Poole & Co., of which the defendant is a member, and alone is served with process in this case.

The sale, if any, was made to William G. Norwood, as a member of and acting for the same firm. No question as to his authority to bind the firm was submitted to the jury, and they were charged in substance that what he did about the purchase of the property for the firm would bind all the members, including the defendant. Much question is made about the correctness of this ruling.

The complaint alleges that the defendant, Poole, and Norwood, were "partners in the business of sawing and manufacturing lumber and timber, and of procuring and owning and operating a saw-mill for that purpose." The defendant, in his answer, admits that he and Poole and Norwood, "were interested together in the business of sawing and manufacturing lumber at the time mentioned in the complaint and contemplated, and intended to procure by lease purchase, or erect a saw-mill."

93 The defendant was a witness at the trial, and was asked, "Do you deny that Mr. Norwood was a partner with you in this business at Homerville"; to which he answered, "No, sir." There was no evidence to contradict this, and in addition it was expressly conceded as a fact that they were partners, fol. 245. On the pleadings it

is not now seen that there was any question in respect to the existence of the partnership to be submitted to the jury, and there does not seem to be any upon the evidence.

It is claimed, further, that if they were partners, the defendant was notified not to deal with Norwood in behalf of the firm, and that his action after that did not bind the firm.

The proposition of law involved in this claim is doubtless correct, and, abstractly considered, probably the suggestion of the court in reply to the defendant's counsel was erroneous. But the suggestion was not made to the jury, and there was no question submitted to them to which they could apply it. The only question on this point now is whether there was error in the refusal of the court to charge as requested in respect to it. It all rests upon the letter of J. Morton Poole & Co. to the plaintiff, dated December 21, 1865, and whether that letter contains such notice. The clause relied upon is, "Though Mr. Norwood is a partner, and must be consulted, we say to you now that we are the responsible parties in the concern and control all the decisions." Taken by itself, this does not say that they wish to control the decisions as to the purchase of this property by requiring her to deal only with them, nor but that they should exercise all the control they desired to by directing Norwood themselves. But they sent the whole letter for her to read and gather their meaning from it. In a previous part of the letter they said: "Mr. Norwood, we are confident, will be governed by our advice, and our counsel to him will be decidedly to purchase the property; and, if he acquiesces with us, we will guarantee the money to you." There are other clauses less prominent in connection with this question. Taken altogether, the letter seems rather to signify that she may deal with Norwood, so far as he will consent in view of the advice they will give him, and they will be bound, then that if she deals with him they will not be bound. Upon this construction of the letter, there was no foundation for the requests in the case.

This was not a saw-mill built at a water privilege to be propelled by the water and to remain as a permanent thing that could not well be moved and used elsewhere; but its means for power belonged and could be carried with it, and it was made to be placed where and so long as it should be wanted for use at any particular place, like a threshing or a horse-power sawing machine. The undisputed evidence showed this, and how it was situated with respect to the land where it was. The defendant requested the court to charge that any erection, whether permanent or capable of separation and removal from the soil, is presumed to become affixed to the soil, and that the burden of proof is upon the party claiming that it is not so fixed to establish that fact, and that the presumption was that as between the heirs and the administratrix the mill was real estate or land. The court did charge that, according to the ordinary use of the term, a saw-mill would be real estate, and, 94 after explaining when and under what circumstances such a mill would be personal estate, finally on this subject charged that, in order to be entitled to recover, the plaintiff must have shown that this mill was personal estate. The principal ground of complaint urged now is that the defendant did not have the benefit of the presumption claimed so far as he was entitled to it.

There is unquestionably a presumption more in favor of the heir in respect to fixtures than in respect to claimants standing upon some other rights. But it is not thought to have been the duty of the court to instruct the jury as to the grounds and reasons of the law on this or any other subject any further than to guide them correctly to the ques-

tions of fact they had to pass upon. The exact question seemed then to be, as it seems now to have been, in this respect, whether this property was personalty that could be bargained and sold as such. As to this the jury were told what would be necessary to find to have it considered as such, and that the plaintiff must have made that out. The question of fact seems to have been correctly placed before them with all the advantage the defendant was entitled to placed on his side, whatever more of sound law there may have been that might have been stated, but would not have varied the question they had to pass upon.

In connection with the subject of whether this mill was real estate, or presumed to be such, it has been argued that if there was any agreement of purchase of any property it was understood by those agreeing to purchase that they were purchasing the mill and land where it stood, and that the minds of the parties never met in an agreement in respect to a sale of the mill as personal property separate from the land; and that if the jury have found such an agreement, there was no evidence to warrant such finding. It was distinctly set before the jury that the plaintiff could not recover unless Norwood, acting for himself and his firm, agreed that the mill was personal estate, and agreed to purchase it as such. On this subject the plaintiff testified that while she was negotiating with Norwood, she told him she did not own but one acre of land at Homerville, where the mill was, and that was the one where the house stood, and that he replied that he had been operating the mill six months on a lease from Lovell & Lattimer, and knew she did not own the land, and knew that it was owned by John H. Mattox. And in the previous correspondence between the defendant's firm and the plaintiff on their making question about and objection to her title, she answered in her letter, dated February 26th, 1866, among other things, "The mill belonged solely to Mr. Graves, and the land and timber to Mr. Mattox," and that the mill "belonged to Mr. Graves, as portable personal property;" and, in a still previous letter to them, dated Feb. 12th, 1866, she wrote, in respect to the mill, "It is personal property for the benefit of the widows and heirs of Cyrus Graves." Norwood's testimony differs from hers, but the whole was before the jury to be considered by them in passing upon this question of fact, and it has been found for the plaintiff; not without evidence, but upon ample evidence, if believed; and, whether it should be believed or not, was a question for the jury, and not for the court.

95 Another question of importance in the case has been made upon the statute of frauds of Georgia, where the property was situated, and the sale, if made anywhere, was made. This statute is substantially like that of most of the other States and of England. It requires acceptance of the goods to make a contract of sale binding, without writing or payment. Here there was no writing or payment, so the contract must rest upon acceptance. No question is made but that whether there was an acceptance is a question of fact for the jury. That question was submitted to the jury, not for them to find whether the facts found would constitute an acceptance, but whether such facts as the court held would constitute an acceptance existed. There was no question but that the defendant's firm had full possession and enjoyment of the mill for several months after the sale claimed was made. If they had that under the purchase, there would seem to have been an acceptance, and that was the question submitted and found for the plaintiff. But it is argued that there was no evidence to support such finding, and *Lillywhite vs. Devereaux*, 15 M. and W., 285, is much relied

upon in support of that proposition. There the subject of the pretended sale was in the possession of the supposed purchaser, both before and after the contract in connection with real property, of which there was a continuing lease. Nothing was done with it on account of the contract of sale, and that was always repudiated by the purchaser. Here it was quite different. The purchasers were in possession under a lease from the plaintiff to Lovell & Lattimer, and an assignment from them, which expired January 1st, 1866. After that they held possession by an arrangement, which was itself a part of the negotiation of sale. If they purchased the mill, they would have it; if not, they would have to deliver it up. The jury found that they did purchase it, and they had it. There does not seem to be any fair doubt but that this tended to show that they had it under the purchase. If the bargain had been concluded at the time of the expiration of the lease, and they had kept it as they did, there would seem to be no room for any question but that there was an acceptance. As it was, the negotiations covered that time, and resulted in a sale under which they had the property, according to the finding of the jury. The possession they had after the sale was under and in pursuance of the sale, as much in the one case as it would have been in the other.

The plaintiff acquired her title and right to this property as administratrix of the estate of Cyrus Graves, deceased, of whom she is a widow, and who died intestate in Georgia, leaving the property there. The laws of that State require sales by administrators, with certain exceptions not material, to be at public outcry, but do not expressly declare what shall be the effect of sales made otherwise. This property was according to the finding of the jury sold at an outcry under an advertisement for such a sale to perfect a title to J. Morton Poole & Co. in accordance with the terms of a private sale. It was objected that this was not a sale at such public outcry as the law required, and this objection was thought to be well founded for the reason that the outcry

96 would seem to be to the parties named and not to parties generally who might wish to bid. Nevertheless the jury were directed to return a verdict for the defendant unless they found that there was both a private sale and also a sale by the agent of the plaintiff by putting up the property and calling for bids and striking it off on a bid for the defendant's firm as the highest bidders. So if a sale, according to the statute, is necessary for the plaintiff to recover, and this will answer, she is entitled to the benefit of the finding. If not necessary it is immaterial whether it will answer the statute or not. It is still insisted that such a sale is necessary and that this one was not sufficient. It still seems that this one was not good as a sale at public outcry. That leaves the question whether she can recover the price of the goods sold at private sale. Neither sales of goods nor private sales of goods are prohibited by the laws of Georgia. The legal property in the goods was vested in her, and she, through others, had the possession and control of them. What right she had as against herself would pass by her contract of sale, and under her contract the purchasers had the property without disturbance from any quarter. The requirement of the statute would seem to be for the benefit of the creditors and heirs only, and a sale to pass any other right than theirs would not be contrary to it. There was no deceit toward them, for they were bound to know the law as well as she. As between the parties to the sale it was not void absolutely but voidable only at the election of the heirs and creditors who have not, as far as appears, ever elected to avoid it. (*Nutting vs. Thomason*, 40 Ga., 39.) The purchasers had the property under their purchase,

they promised to pay her for it, the consideration has not failed, and no good reason is apparent why they should not fulfil. As the promise was made directly to her she can maintain the suit without avering or proving anything more than that she sold them the property which they had and have not paid for. (*Haskell vs. Bowen*, 44 Vt., 579.) Several cases decided by the courts of Georgia have been cited, but none have been brought to notice that appear to be contrary to these views.

It is also argued that the letter of Bassinger to the defendant's firm which was excluded at the trial should have been admitted, on the ground that it was induced by a letter of Tooke to Bassinger, written in behalf of the plaintiff. But Tooke did not for the plaintiff, nor at all, request Bassinger to write to J. Morton Poole & Co. He wrote to them of his own mere motion, and the letter was only a communication between an attorney and his clients, as to all others mere hearsay.

These are the principal grounds of the motion, and as now considered none of them are entitled to prevail.

The motion for a new trial is overruled with costs, and let judgment be entered on the verdict.

HOYT H. WHEELER.

(Endorsed:) U. S. circuit court, north dist. of N. Y. *Graves vs. Porter*. Opinion. Filed April 25, 1878.

97 Know all men by these presents that we, Bandery Simmons and Edward Pusey, both of the city of Wilmington, New Castle County, and State of Delaware, are held and firmly bound unto Jennie L. Graves, as administratrix of Cyrus Graves, deceased, in the full and just sum of fifteen thousand dollars, lawful money of the United States, to be paid to the said Jennie L. Graves, her successors and assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators and assigns, jointly and severally, by these presents. Sealed with our seals and dated this tenth day of August, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas, on the twenty-sixth day of July, one thousand eight hundred and seventy-eight, in the United States circuit court for the northern district of New York, in a suit depending in said court between Jennie L. Graves, as administratrix, &c., of Cyrus Graves, deceased, and William T. Porter, impleaded with J. Morton Poole and W. G. Norwood, judgment was rendered against the said William T. Porter, impleaded with J. Morton Poole and W. G. Norwood; and the said William T. Porter, impleaded, &c., having obtained a writ of error, and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Jennie L. Graves, as administratrix, &c., of Cyrus Graves, deceased, citing and adminishing her to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of this obligation is such that if the said William T. Porter, impleaded with J. Morton Poole and W. G. Norwood, shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and effect.

BANDERY SIMMONS. [SEAL.]
EDWARD PUSEY. [SEAL.]

Sealed and delivered in presence of—

S. RODMOND SMITH.
JOHN R. GALLAHER.

UNITED STATES OF AMERICA,

District and State of Delaware, County of New Castle, ss :

99 Bandery Simmons, being duly affirmed, says he is one of the obligors on the foregoing bond; that he is a resident and freeholder in the State of Delaware, and worth the sum of thirty thousand dollars over and above all the debts and liabilities which he owes or has incurred, exclusive of property exempt from levy and sale under an execution.

BANDERY SIMMONS.

Affirmed to before me this 10th day of August, A. D. 1878.

[L. S.]

S. RODMOND SMITH,

U. S. Commissioner, District of Delaware.

UNITED STATES OF AMERICA,

District and State of Delaware, County of New Castle, ss :

Edward Pusey, being duly affirmed, says that he is one of the obligors in the foregoing bond; that he is a resident and freeholder in the State of Delaware, and worth the sum of thirty thousand dollars over and above all the debts and liabilities which he owes or has incurred, exclusive of property exempt from levy and sale under an execution.

EDWARD PUSEY.

100 Affirmed before me this 10th day of August, A. D. 1878.

[L. S.]

S. RODMOND SMITH,

U. S. Commissioner, District of Delaware.

UNITED STATES OF AMERICA,

District and State of Delaware, County of New Castle, ss :

On this 10th day of August, one thousand eight hundred and seventy-eight, personally appeared before me Bandery Simmons and Edward Pusey, to me known to be the individuals described in and who executed the foregoing bond, and severally acknowledged to me that they executed the same.

[L. S.]

S. RODMOND SMITH,

U. S. Commissioner, District of Delaware.

I hereby certify that the above obligors are amply sufficient and responsible to answer their obligations assumed in the foregoing bond.

Witness my hand this tenth day of August, A. D. 1878, at Wilmington, Delaware.

EDWARD G. BRADFORD,

U. S. District Judge, District of Delaware.

101 UNITED STATES OF AMERICA,

District of Delaware, ss :

I hereby certify that Edward G. Bradford, who hath subscribed the foregoing certificate as to the sufficiency of the foregoing obligors, was at the time of the subscription thereof and now is the judge of the district court of the United States for the district of Delaware, duly commissioned and qualified; and that his signature thereto is genuine.

Witness my hand and the seal of said court at Wilmington, in said district, this tenth day of August, A. D. 1878.

{ SEAL U. S. DIST. }
{ CT., DELAWARE. }

S. REDMOND SMITH,

U. S. Commissioner, District of Delaware.

102 (Indorsed :) United States circuit court, northern dist. of New York. Jennie L. Graves vs. J. Morton Poole, impleaded; et al. Bond on writ of error to U. S. Supreme Court.

I approve of the form of the within bond and of the sufficiency of the sureties therein.

Dated August 13th, 1878.

SAM'L BLATCHFORD,
Circuit Judge.

Filed Aug. 15, 1878.

103 UNITED STATES OF AMERICA, ss :

The President of the United States of America to the honorable the judge of the circuit court of the United States for the northern district of New York, greeting :

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court before you, the Hon. Hoyt H. Wheeler, between Jennie L. Graves as administratrix, and so forth, of Cyrus Graves, deceased, plaintiff, against William T. Porter, impleaded with J. Morton Poole and W. G. Norwood, defendant, a manifest error hath happened, to the great damage of the said defendant, as is said and as appears by the complaint and by the judgment; we being willing that error, if any hath been, should be duly corrected, and full & speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, 104, 105 said, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court, the 15th day of August in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.]

CHARLES MASON, *Clerk.*

The foregoing writ is allowed.

August 13, 1878.

SAM'L BLATCHFORD,
Circuit Judge.

106 (Indorsed :) United States circuit court, N. D. of N. Y. Jennie S. Graves, as administratrix, &c., vs. J. Morton Pool, impleaded, et al. Writ of error. Filed Aug. 15, 1875.

107 UNITED STATES OF AMERICA, ss :

To Jennie L. Graves as administratrix, &c., of Cyrus Graves, deceased :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein William T. Porter is plaintiff in error and you are defendant in error, to show cause, if any such there be, why the judg-

ment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Samuel Blatchford, one of the judges of the circuit court of the United States at the city of New York, in the second circuit, the 13th day of August, 1878.

SAM'L BLATCHFORD,
Circuit Judge.

HENRY J. SCUDDER,
Att'y for Pl'ff in Error.

108 Due service of a copy of within writ of error, citation, & the supersedeas is hereby admitted.

Aug't 20, 1878.

M. GOODRICH,
Pl'ff's Attorney, of Auburn, N. Y.

(Indorsed :) United States circuit court, N. D. of N. Y. Jennie L. Graves, as administratrix, vs. J. Morton Poole, impleaded, et al. Citation. Henry J. Scudder, att'y for pl'ff in error, 66 Wall st., New York. Filed Oct. 9, 1878.

109 UNITED STATES OF AMERICA,
Northern District of New York, ss :

I, Charles Mason, clerk of the circuit court of the United States of America for the northern district of New York, do hereby certify that I have compared the writings annexed to this certificate with their respective originals now on file and remaining of record in my office, and they are correct copies of such originals, being a full and complete transcript of the record and proceedings in the suit of Jennie L. Graves, administratrix, &c., vs. William T. Porter, impleaded, &c.

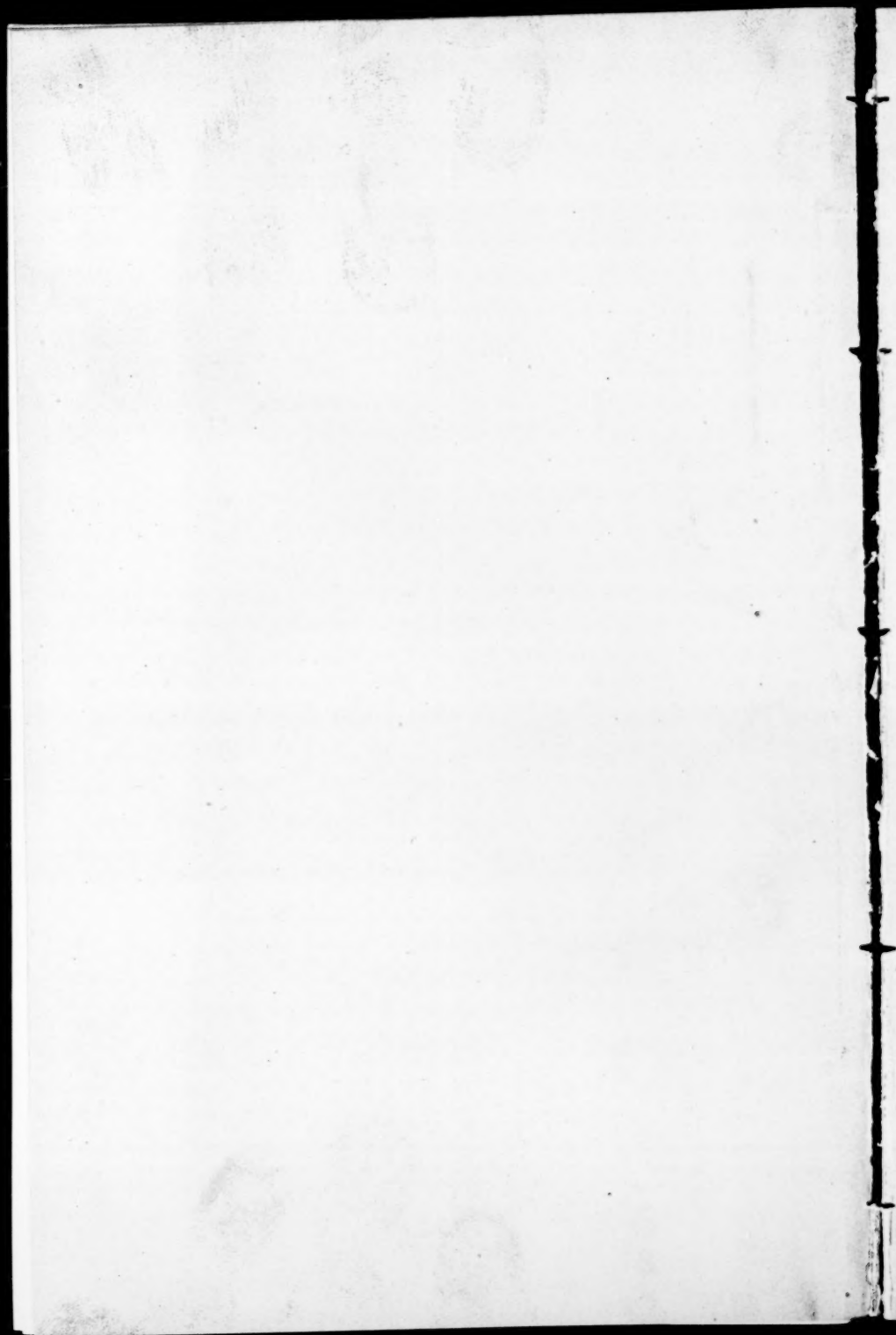
In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court at the city of Utica, in said northern district of New York, this seventh day of October, in the year of our Lord eighteen hundred and seventy-eight, and of the Independence of the United States of America the one hundred and third.

[SEAL.]

CHARLES MASON, *Clerk.*

(Indorsement on cover :) No. 307. William T. Porter, impleaded with J. Morton Poole and W. G. Norwood, pl'ff in error, vs. Jennie L. Graves as administratrix, &c., of Cyrus Graves, deceased. N. New York, C. C. U. S. Filed 21st October, 1878.

REC. 307—6





UNITED STATES SUPREME COURT.

WILLIAM T. PORTER, IMPLEADED, &C.,

Plaintiff in Error,

VS.

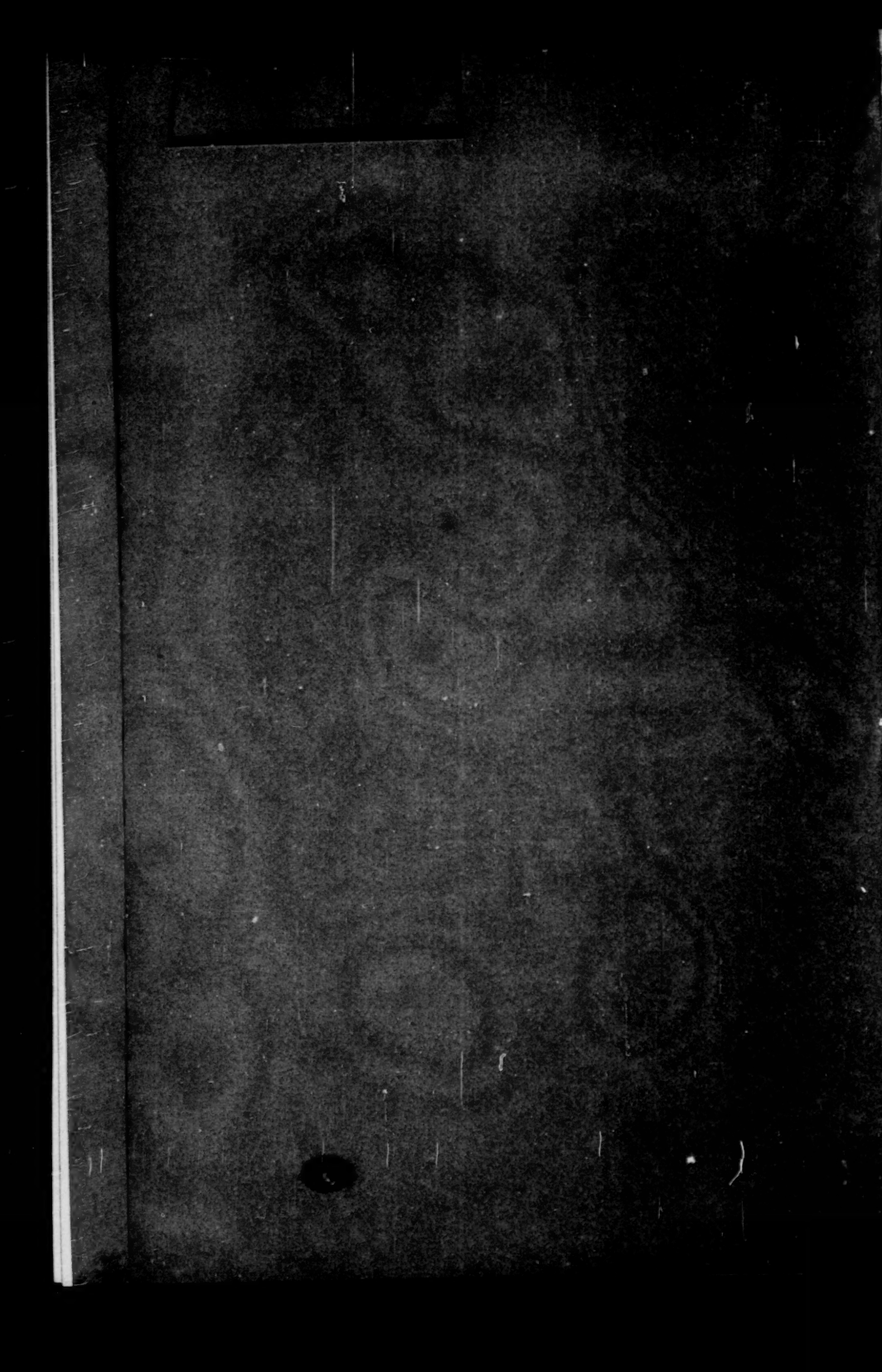
JENNIE L. GRAVES, AS ADMINISTRATRIX,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

HENRY J. SCUDDER,

Of Counsel for Plaintiff in Error.



U. S. Supreme Court.

WILLIAM T. PORTER, Impleaded, &c.,
Plaintiff in Error,

VS.

JENNIE L. GRAVES, as Administra-
trix,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Statement of the Case.

This writ of error is brought to review a judgment for \$9,942⁵³/₁₀₀, rendered against the plaintiff in error by the Circuit Court of the United States, in the Northern District of New York. The plaintiff in error was the only party served, or who appeared in the action.

Jennie L. Graves sues as administratrix, to recover \$5,000, the price for a steam saw mill, alleged to have been sold by her as the administratrix, under the laws of Georgia, by her deceased husband, Cyrus Graves, to the firm of J. Morton Poole & Co.

The declaration (Record, p. 13) alleges that plaintiff's intestate, erected a building with machinery for sawing lumber, on the land of one Mattox, at Homerville, Ga., under an agreement with Mattox that the same should stand there to be used in sawing, &c., for their joint benefit, with the further stipulation that the same should remain the personal property of the deceased.

The declaration then alleges the partnership of Poole, Porter & Norwood, and an agreement by them with the plaintiff, by which she agreed to sell and they agreed to purchase the saw

mill, for \$5,000; "it being in said agreement stipulated that the plaintiff should, and she did, make delivery of the said saw mill to the said purchasers, on or about the first day of January, 1866; and thereupon, if they should require that the plaintiff should make application to the Court of ordinary for an order to sell, and thereunder should make sale of the said saw mill to them by public sale, through public outcry, in the said County of Thomas, in conformity with the laws of the said State of Georgia; it being further understood and stipulated that they, the said purchasers, or some one or more of them, or some one duly authorized to act for them in that behalf, should be present and bid off the said bargained and purchased property at such public sale through public outcry."

The answer (Record, p. 16) admits that a saw mill, with machinery and appliances for sawing lumber, stood on certain land at or near Homerville, but denies knowledge of whose land it stood on, or of any agreement under which it was erected.

"And defendant admits that he and the defendants Poole and Norwood, *were interested together in the business of sawing and manufacturing lumber, and contemplated and intended to procure by lease or purchase, or erect a saw mill, in the neighborhood of Homerville; but said defendant denies that the defendants, or either of them, applied to the plaintiff to purchase the saw mill described in the complaint, and alleged to have been the personal property of Cyrus Graves in his lifetime, or to buy any personal property.*"

The defendant alleges a negotiation to buy certain *real property* of the plaintiff, and denies any sale or delivery.

"And defendant denies that the plaintiff had any authority to contract with defendant in reference to said saw mill, in the form or under the circumstances alleged in the complaint, and alleges that, by the laws of Georgia, the administrator of an intestate estate was required to make all sales of the personal estate of such intestate at public outcry."

The defendant denies requesting the plaintiff to procure the order of sale, or that they agreed to become the purchasers, or took or accepted possession thereof under any purchase, "and defendant denies that under the laws of Georgia the plaintiff had authority to make the agreement alleged in the complaint,

"and defendant alleges that the said alleged contract was contrary to said laws and void."

Upon the trial the plaintiff gave in evidence a correspondence between herself and J. Morton Poole & Co.—her letters being all written at Cincinnati, New York, and theirs at Wilmington, Del.

The defendants, Wm. G. Porter and J. Morton Poole, composed the firm of J. Morton Poole & Co.

The substance of these writings were as follows (Record, p. 18) and for greater convenience is here set forth:

December 1, 1865—Defendants write: "We have a letter from W. G. Norwood, the tenant of your saw mill at Station No. 11, requesting us to ascertain *the terms on which you will renew to him the lease of said mill*, which he now holds by assignment from Lovell & Lattimore, the former tenants."

December 13th.—The plaintiff answers: "I prefer selling the mill in question for \$5,000."

December —. Mr. Pusey, defendant's agent, went to see plaintiff, and brought back a letter from her (Record, p. 38), offering to rent the mill for \$150 a month, or sell for \$5,000.

December 21. Defendants write, "We would like to be informed what it is that you own at Station No. 11.

"Is the mill on your land, and if so, how much land have you, or if not on your land, what lien have you on it. Also, is there a house or houses on the land.

"We do not think your price unreasonable—and though Mr. Norwood is a partner and must be consulted, we say now, as Mr. Pusey said to you personally, that we are the responsible parties in the concern and control all the decisions.

"We should expect, if we purchased the property, you transfer to us your claims on Lovell & Lattimore.

"Please inform us how you hold this property, if in fee, and from whom you derived it—if from your deceased husband do you hold it by will, or was he intestate. This information we should have so that we may know we get a good title in exchange for our money.

December 26. Plaintiff writes, "My friends in Georgia ask me to come there immediately to the settlement of my father's estate. I shall go right away. The title is unquestionable. I am the administratrix on my husband estate. Mr. Graves was the sole possessor of the property in question. I

“prefer arranging the matter with Lovell & Lattimore, rather than to assign to you.

“I shall not have time to hear again from you before I leave. Will add, *you can run the mill from the words you had from me by the hands of Mr. Pusey until I advise you from the mill,* or via your agent in Georgia. As I have to go, I will arrange the business through your agent there.

December —. Plaintiff writes: “Sickness will prevent my going this week.

“Send me a draft on New York for \$5,000, and I will give you a good title for the mill. I had one cart, and mill tools—a new house where the foreman has lived—with the house is one acre of land. These I will sell you reasonably.

“Should you conclude to buy, write me immediately. I leave here on Thursday of next week for New York.”

January 1, 1866. Defendants write: “We are in receipt of your letter without date. If you telegraph us at your departure from home, we will get Mr. Pusey to meet you. You should bring with you, to show him, your title deeds to the land, and a certificate from the county, of your appointment as administratrix.”

January 8, 1866. The plaintiff writes: “I came through the lines when we were not allowed to bring papers of any kind.”

“I could sell you the mill and mill property (*i. e.*) the house and lot, cart, and whatever tools, &c., that belonged to the mill, for the sum of \$5,500.

“I shall have to make returns to the ordinary of Thomas Co., Georgia, and he will receipt the same, and charge it to me, to be paid to my heirs.

“This is the way I have perfected all sales since Mr. Graves’ death.

“I conclude, from yours written after Mr. Pusey’s return to your place, that you are willing and ready to pay the price I named for the mill, but I would like to make a full sale and have added the house, &c., which you must need with the mill, for the small additional figures. I think an assignment of this, acknowledged before judge or justice, will give you full possession: so I am informed.”

January 15, 1866. Defendants answered: “In offering to give you \$5,000 for the mill property at station No. 11, we supposed we were buying the whole property—mill, house,

“land, &c.,—your whole interest at the place, and were surprised
 “to learn from your last two letters that we had misunderstood
 “your offer, that it was the saw mill alone that you intended to
 “sell for \$5,000, and require \$500 more for the necessary
 “appendages to the saw mill. We are not prepared to accede
 “to what we consider your increased demand. We are pre-
 “pared to give you \$5,000 for your whole interest at that place
 “when we are satisfied that you can give us a clear title to the
 “property in exchange for our money.

“As you propose going to Georgia we would propose that you
 “lay the evidence of your right to dispose of this property be-
 “fore our friend, W. S. Bassinger, attorney at law, in Savan-
 “nah, and upon your satisfying him that all is right, he will give
 “you a draft on us for the amount, or the payment may be ar-
 “ranged in any other way you may prefer. It is right and
 “necessary that we are assured that the property is ours when
 “we have paid for it.”

Feb. 12, 1866. Plaintiff replied :

“Your claim shall be a perfect one. The Judge
 “marked it all private property, “personal proper-
 “ty” subject to sale Now it is offered to you,
 “the mill as I have told you. The mill for \$5,000. The house
 “for \$500. You may never fear the mill is mine—there is no
 “incumbrance and if your papers are not right, I am liable for
 “law and damage. A bill of sale is all the papers I need, for it
 “is personal property.”

Feb. 15, 1866. Defendants answered :

“We never doubted you having been appointed administra-
 “trix of your husband’s estate, but as we said in a former let-
 “ter, we knew nothing of the administration of Georgia, that
 “there might be some form of procedure under those laws that
 “you would be required to follow in making a good conveyance
 “of the property, which if not followed would impair the
 “validity of the title—hence our suggestion that you should lay
 “the evidence of your authority to dispose of this property be-
 “fore Mr. Bassinger, our attorney. *Our offer to you to purchase*
 “*this property has always been conditioned upon your ability*
 “*to make a good conveyance*, and since writing last to you, we
 “have received information which fully justifies us in the pru-
 “dent course we had resolved to pursue.

“Upon a statement of the facts in connection with this prop-

"erty to our counsel, we are advised that the property is not in
 "you, and that you cannot legally convey it, *hence our offer to*
 "*purchase becomes void.*

"We are informed that your husband, in connection with Dr.
 "Mattox, erected this mill on the land of the latter ; that the
 "Dr. afterwards sold your husband his interest, with permis-
 "sion to occupy the land ; that Mattox then sold the land to a
 "man named Livingston, taking a mortgage from him. If we
 "are correctly informed the above statement shows that the
 "title to this property is in Livingston, not in you, as the rep-
 "resentative of your husband, and that you cannot convey it.
 "This is an entanglement that would necessarily have to be re-
 "moved before we become the purchasers."

Feb. 26, 1866. The plaintiff answered :

"Mattox had no interest in the mill. The partnership was
 "this : The mill belonged solely to Mr. Graves and the land and
 "timber to Mr. Mattox. I knew of the sale of the land, but
 "that did not affect or have any connection with the mill—that
 "belonged to Mr. Graves as portable personal property. I am
 "very much disappointed in your offering 'fatal reasons'
 "when you said you were ready to take the mill, when you
 "knew I had authority to convey it legally to another party.

"Gentlemen, I should be glad to sell you this property—this
 "you know.

"But again, I say the mill is yours for the amount I have men-
 "tioned to you, with a full assurance that no trouble shall ever
 "arise from the sale ; *there are no heirs except the two little*
 "*ones, besides me.*"

This closed the correspondence. Mrs. Graves left Cincinnati,
 New York, after writing the above letter of February 26, and
 went to New York, and from there by steamer to Savannah.
 Staid there a day or longer, but *did not call on Mr. Bassinger*,
 and thence went to Thomasville, Ga. (Record, pp. 45 and 46).

The day after her arrival or the next day Mrs. Graves called
 on Mr. Took, the ordinary of Thomas Co. (Record, p. 46), and he
 then, on her written application, made the order dated March 5,
 1866 (Record, p. 26), permitting her to sell the steam saw mill
at private or public sale—and requiring her to report her acts to
 the Court. The application (Record, p. 25) represents that the
 mill can be sold without delay at private sale.

William G. Norwood, one of the defendants (not served or

appearing), had been running the mill as assignee of a lease from Mrs. Graves to Lovell & Lattimore (Record, p. 56. See correspondence, Record, pp. 53-54). On her way from Savannah to Thomasville, Mrs. Graves passed through Homerville and sent for Norwood and had a few minutes conversation with him while the train stopped there (Record, p. 38), in which she stated to him that she had "had a correspondence with J. Morton Poole & Co., and they have offered to buy the mill and I want "to sell it. I have had other offers for it, but you are in possession, and if you want the mill I would like to have you come "to Thomasville and perfect the sale. It was there I took letters "of administration and want to make a good sale of it. "It is my errand down here and I would like to have you come "up and satisfy yourself that the title is all right. *He said he "would come up after he had seen Mr. Bassinger."*

The plaintiff had no correspondence with Norwood and did not see him again until April 15th (Record, p. 46). Her versions of that interview are at p. 38 and p. 46 & 47, of the Record and in substance are, that Norwood told her the mill would have to be sold at public outcry, and that he would bid it off, and that she then told him certain of the objections J. Morton Poole & Co. had made. The next day she went to the ordinary, Took, (p. 40) and he drew the notices of sale, one of which was preserved by Thompson, who acted as her agent in making the sale under a power of attorney (p. 43), also drawn by the ordinary, (p. 40, 35).

The notice was as follows (p. 28):

"State of Georgia, Thomas Co. Agreeable to an order of
"the Hon. Court of Ordinary of Thomas County, the under-
"signed will sell on Monday, the 30th day of April instant, at
"the residence of Cyrus S. Graves, deceased, known as his
"steam mill place in Clinch County, State aforesaid, the
"steam mill, and fixtures thereto, the property of said deceased.

SALE TO PERFECT A TITLE TO THE SAME TO J. MORTON POOLE &
CO. UNDER AND IN ACCORDANCE WITH THE TERMS OF A PRIVATE
SALE MADE TO AND WITH THEM FOR SAID PROPERTY.

JENNIE L. GRAVES,
Administratrix.

April 16, 1866.

Thompson appeared at Homerville as the plaintiff's agent on the 30th day of April, and his version of what occurred there is on pp. 33 and 35 of the Record.

He read the notice and announced "that the object of the sale was to *perfect a prior title to said mill in J. Morton Poole & Co.*, which they had acquired by a purchase of the mill of the plaintiff by private agreement for \$5,000." There were one or more bids less than \$5,000 by persons other than Norwood. Shortly he bid "understanding the bid made by him for the said firm of J. Morton Poole & Co. Upon his making it I received and treated it as such by at once announcing it audibly to all that I was offered by J. Morton Poole & Co. for the property to be sold, \$5,000."

No more was bid and he knocked the property down to them.

"Thereupon Norwood with the others turned and went away—Norwood went back into the mill without paying said bid, and I did not ask him for it but took the train and returned to Thomasville."

On November 1, 1866, defendants notified the plaintiff they had ceased operating the mill; and on November 28th repeated the notice, (see letters, Record, pp 48-52, also letter of December 5, 1866, p. 57).

The defendants deny bidding at the so called auction sale. Norwood (p. 56), Cooper (p. 62.)

Assignment of Error.

The rulings of the Court below are assigned as errors for the reason that the evidence erroneously admitted under said rulings influenced the jury, or was calculated so to do.

I. Errors in the admission of evidence.

(1) Deposition of HENRY H. TOOKE (p. 27):

Q. Did any one other than the plaintiff, about the time that she applied for the order and notices for the sale by public outcry, come to you and make application or request that such order and notices be given and such sale by public outcry be had? If yea, state who that person was, and whether he called upon you before or after the notices for such sale by public outcry were given.

To which question the defendants' counsel objected as improper and not calling for or naming any individual connected with the defendants.

The objection was overruled and defendants excepted.

A. A gentleman called upon me on or about that time at my office. I think he was here one day, and she the next, or else she called on the same day after he had called. I was not acquainted with him. He said his name was Norwood. We had a good deal of talk as regards the sale of the mill. He spoke about a firm. He said he had been advised to have a public sale of the mill, as is usual here. He had been advised by some lawyer in Savannah, perhaps by the name of Bassinger. I am not certain that was the name. He desired to have a legal sale of it, and that notices be given. I told him that should be done, and they were given. Plaintiff called before the order was made and notices given, and made the same request, as I have already stated. The man came in and told me his name was Norwood. He talked that he was one of the persons interested in the purchase of the mill. He mentioned the firm name, and I put in the notices the name of that firm.

(2) Same deposition (p. 28):

Q. Do you know if any one, and if any one, who, was authorized and directed by the plaintiff to attend at the time and place mentioned in the notice and make sale of the mill?

Defendant's counsel objected to the question as incompetent. The objection was overruled by the Court, and defendant excepted.

A. Yes. It was E. O. Thompson, of this place. The distance from Thomasville to Homerville is 100 miles on the Atlantic and Gulf Railroad.

(3) Same deposition (p. 30):

Q. You were asked on cross-examination whether you considered the private sale of the mill in question legal, and your answer in substance was that you did not consider it so without the order which was made; now, I ask you to state whether with that order and with the notices given and the sale by public outcry that was made of the mill, you did or did not consider the sale altogether as proper and legal?

Defendant's counsel objects upon the ground that it implies the existence of a fact which has not been proved, and as calling for the opinion of the witness.

Plaintiff's counsel stated that he would prove hereafter that there was a sale at public outcry. Upon such statement the Court admitted the evidence.

To which ruling defendant's counsel duly excepted.

A. So far as my official acts are concerned, I considered them legal.

(4). Deposition of Edward O. Thompson, p. 32.

The plaintiff's late husband was a brother of my wife. He sometimes wrote his name Cyrus Graves. He died in 1862. He put up one of these portable steam saw mills at Homerville, Clinch Co., Ga., in 1861, and continued to own it from that time until he died. It was placed on land (defendant's counsel in due season objected to the oral evidence of the witness as to the ownership of the land, and plaintiff's counsel stated that he did not claim it as evidence of ownership, and the Court instructed the jury that such evidence was not evidence of the title to the land, and in that view allowed the evidence to be read,) owned by John H. Mattox, near a large tract of standing pine, suitable for sawing. (In due season the defendant objected to the following answer as irrelevant:) "The machinery and its fixtures was full and all new and first quality. The mill was in all respects a first class portable steam saw mill."

The Court overruled the objection and defendant excepted.

The plaintiff's counsel read the following question administered to this witness with interrogatory: "what, if anything, do you know of a sale having been made of said steam saw mill with the boilers and fixtures thereto belonging, but exclusive of the site, by the plaintiff or by her authority and direction to the firm of J. Morton Poole & Co., in the latter part of April, 1866. Please state fully what you know of such a sale having been made."

The defendant's counsel objected to the form of the question and also that it was incompetent and immaterial, and the answer was not responsive.

The Court overruled the objection and defendant excepted. The answer of the witness was then read.

Ans. I knew the plaintiff, in the spring of 1866, came to Thomasville and as administratrix of her husband's estate, obtained from the Ordinary of Thomas Co. an order and had notices, three or more, drawn by the Ordinary and posted in Homerville, for a sale there of the mill in question, at public outcry, on the 30th day of April in that year. I assisted her in obtaining the order, and she employed me to make the sale for her.

Defendant's counsel objected to the following portion of said answer.

She directed me when I went to make sale of the mill to call upon W. J. Norwood, whom I would find at the mill, and let him know I had come to make the sale for her, so that he might attend and bid off the property for said purchasers, J. Morton Poole & Co.

The Court overruled the objection and defendant excepted.

I did call upon and so inform said Norwood when I went to make said sale. I found him at said mill.

The defendant's counsel specifically objected on like grounds to the following portion of said answer.

He said, in substance, he was expecting some one to come and make the sale.

The Court overruled the objection and defendant excepted.

Defendant's counsel objects specifically on like grounds to the following portion of said answer:

I made sale of the mill in question at public outcry.

The Court overruled the objection and the defendant excepted.

between the hours of ten and half-past eleven o'clock in the forenoon of the 30th day of April. What I then offered for sale (defendant's counsel specifically objects to the following portion of said answer) and sold, (the Court overruled the objection and defendant excepted), was not said mill, with the site it was occupying, but only the mill itself without the site, including the machinery with all its fixtures, the same as owned by said Graves in his lifetime, and then belonging to this estate. At first, there was one or more bids of less than \$5,000 $\frac{99}{100}$ each by persons other than said W. G. Norwood, shortly he bid (defendant's counsel specifically objected on like grounds to the following portion of said answer) understanding the bid made by him for the said firm of J. Morton Poole & Co. (the Court overruled the objection, and defendant's counsel objected), upon his making it, I received and treated it as such by at once announcing it audibly to all, that I was offered (defendant's counsel specifically objected on the like grounds to the following portion of said answer) by J. Morton Poole & Co. (the Court overruled the objection, and defendant's counsel excepted) for the property to be

sold, \$5,000. To my so treating and announcing it, said Norwood, who was near, and within easy hearing distance from me (the defendant's counsel specifically objected on like grounds to the following portion of said answer), neither objected nor dissented to the sale. (The Court overruled the objection and defendant's counsel excepted.) Neither did any one object or dissent while I cried the sale. I distinctly cried the bid of five thousand dollars (\$5,000) (defendant's counsel specifically objected on the like grounds to the following portion of said answer) as the bid of J. Morton Poole & Co. some two or three times (the Court overruled the objection and defendant excepted), stating if no more was bid I should knock the property down to them for that. No more was bid, so I did knock the property down to them (defendant's counsel specifically objected to the following portion of said answer), declaring the same sold to them, said J. Morton Poole & Co., for (\$5,000) five thousand dollars (the Court overruled the objection and defendant excepted) and that closed the sale. Said Norwood was still present, but thereupon Norwood with the others turned and went away. Norwood went back into the mill, and as he so left without paying said bid, I supposed its payment had been specifically arranged or provided for in the private negotiation between the plaintiff and said purchasers preceding said sale; so I did not ask him for it, but took the train and returned to Thomasville (defendant's counsel specifically objected on the like grounds to the following portion of said answer), reporting the sale made both to the plaintiff and said Ordinary. (The Court overruled the objection and defendant excepted.)

(5) Testimony of Jennie L. Graves (p. 43):

Q. Did you say anything to Thompson as to calling upon Norwood at the mill?

Objected to as irrelevant and incompetent, objection overruled and evidence admitted for the purpose of showing what directions were given by plaintiff to Thompson; exception taken by defendants' counsel.

A. I told Mr. Thompson that probably Norwood would be there to bid off the mill for J. Morton Poole & Co.; I gave him directions about calling on him and about price.

Q. What did you say to him about the price?

Same objection, ruling and exception.

A. I said to Mr. Thompson that they would pay \$5,000 for the mill, and told Mr. Thompson what Mr. Norwood had told me (p. 43) about the payment; that he might not have the money.

(6) Q. Was there anything on the power of attorney when he handed it back you that was not on it when he took it from you at the Ordinary's?

A. There was. What there was, was in Thompson's hand-writing; I knew his hand-writing.

Q. What was that memorandum?

Objected to by defendant's counsel, first, that the facts already in evidence show that Thompson was not an auctioneer; second, that the facts show that there was no auction sale; third, that there was no evidence to fix the time when the memorandum was made.

THE COURT: I will receive the evidence.

Exception taken by defendant's counsel.

A. I don't know as I can give the words. I think it was dated "April 30th, 1866; I have this day or to-day sold at Homerville, for Mrs. Jennie L. Graves her saw mill, to perfect a title to J. Morton Poole & Co.; the same was bid off by Wm. G. Norwood for them, or for J. Morton Poole & Co.; price, \$5,000.00." Signed by Mr. Thompson. That is as near as I can tell; it was the substance.

(7) Same testimony (p. 44):

Q. How soon did you communicate, and how did you communicate in respect to the sale and price of the mill with J. Morton Poole & Co.?

Objected to as leading and implying a communication which has not been shown to have taken place.

Q. Did you communicate with them?

A. I did; I wrote them a letter; wrote J. Morton Poole & Co. a letter from New York on my return; wrote it at the depot, and think it must have been the 10th of May; addressed to them at Wilmington. To that I have never received any reply. I wrote to them again from my home about ten days after. I have had no reply to that.

DEFENDANT'S COUNSEL: If the Court please, I suppose this evidence in respect to letters being written is inadmissible unless it is followed up by proof that the letters

were received, and I ask that that part of the evidence be stricken out.

THE COURT: I think it is well enough for her to state that she wrote them a letter and did not get her pay. That may stand.

Exception taken by defendant's counsel.

(8) Deposition of Charles Foster (p. 67.)

Q. Did the plaintiff make any claim for the money she had expended in going to Georgia to perfect title of the mill for the defendants, or the purchaser or purchasers, whoever they were. I mean did she make the return of such money a claim which she had come to demand of them?

The defendants' counsel objected to the question—immaterial, irrelevant and incompetent. The Court overruled the objection and defendant excepted.

Q. Did you make any such suggestion?

A. In the talk with them when I found they would not pay, I endeavored to get them to make some offer by way of settling, and said to them that they ought at least to pay Mrs. Graves all the expense she had been at in negotiations, and going to Georgia in reference to the title; that suggestion was refused.

(9) Testimony of Jennie L. Graves (p. 68).

Q. At the time Norwood came to Thomasville, did he make any statement to you there that he wouldn't give \$5,000 for the mill, and objected to the firm offering you \$5,000?

Objected to as leading and improper. Objection overruled. Exception taken by defendants counsel.

A. No, sir.

Q. Did you offer there to take \$4,000 or any other price than the \$5,000 for the mill?

Objected to by defendant's counsel as incompetent and leading. Overruled. Defendant's counsel excepted.

A. I did not.

Q. Was there anything there in that interview between you and Norwood from first to last, there, at Thomasville, said by you that he or his firm could continue to occupy the mill other-

wise than under a purchase, until you should further advise them when you got home?

Objected to as incompetent and leading. Objection overruled. Exception taken by defendant's counsel.

A. No, sir.

Plaintiff's counsel then offered in evidence § 2050 of the Code of Georgia, of 1873. Defendant's counsel objected that it was enacted after this cause of action arose.

The Court admitted the section and defendant's counsel excepted.

The plaintiff's counsel then presented a computation of interest at 7 per cent. Defendants' counsel claimed that no more than 6 per cent could be recovered in this Court.

II. After the parties had rested, motions were made by defendant as follows (p. 69).

Defendant's counsel then requested the Court to instruct the jury, that upon the evidence the plaintiff is not entitled to recover a verdict.

Defendant's counsel also requested the Court to direct a verdict for the defendant, which direction the Court refused, and defendant excepted.

Defendant's counsel also requested the Court to direct a verdict for the defendant, or instruct the jury that the plaintiff cannot recover in her capacity of administratrix, nor can she recover in this action in her individual right; which the Court declined to do, and defendant excepted.

Defendant's counsel also requested the Court to charge the jury as follows (p. 70):

1. That it now appears that any pretended sale in Georgia was void under the Statute of Frauds of that State, there being no entry made by a proper auctioneer at the time of sale. The Court held that there was no proof of any entry at the time of the sale, but that it was a question for the jury whether there had been a delivery which would satisfy the Statute of Frauds. To which refusal and ruling defendant excepted.

That the possession of Norwood has been shown not to have been under any contract of sale.

Refused, and defendant excepted.

Also that said pretended sale, being professedly merely a

completion of the assumed previous private contract, and it appearing and being conceded that there was no previous contract, there was nothing to complete, and the attempted sale had no force or validity.

Refused, and defendant excepted.

That under the Statute Law of Georgia there was no valid contract between the parties, for want of a sufficient memorandum in writing.

The Court held that there was no sufficient memorandum in writing, but declined to charge as requested; to which ruling defendant excepted.

That the attempted sale at public outcry to perfect a previous private sale is contrary to the law and public policy of the State of Georgia, and therefore void.

Refused, and defendant excepted.

That the private sale of the property in question, being illegal, no concerted attempt by the parties thereto to validate it by the forms of a public sale, under an order of the Ordinary, can be effectual.

Refused, and defendant excepted.

No agreement of the parties, or united request on their part, to secure a formal compliance with the law in aid of a previous illegal private sale, will render the latter valid.

Refused, and defendant excepted.

The formal public sale of the mill, made expressly to perfect a title to the same to the defendants, in accordance with the terms of a private sale made of said property to them, is a mere form and an evasion of the statute, and hence illegal.

Refused, and defendant excepted.

That Norwood had no authority to bind the defendant by a purchase of the mill.

Which the Court refused to charge, and defendant excepted.

That although a partner, Norwood's authority was limited, and the limitation known to the plaintiff, and that any purchase of the mill by him, being in excess of his authority, did not bind the defendant.

Which the Court refused to charge, and the defendant excepted.

That there is no evidence as to who owned the land on which the mill stood.

Refused, and defendant excepted.

Any erection, whether it be permanent or capable of separation and removal from the soil, is presumed to become affixed to the soil, and the burden of proof is upon the party claiming that it is not so affixed, to establish the fact.

Refused, except as charged as appears, and defendant excepted.

The presumption is that, as between heirs and the administratrix, the mill was real estate or land.

Refused, except as charged as appears, and defendant excepted.

If considered as personal property, then the title vests in the administratrix as trustee for the heirs and creditors (Code, § 2483).

Refused, except as charged as appears, and defendant excepted.

The sale by the administratrix, unless in the form prescribed by law, conveys no greater title than she has herself (Code, § 2639).

Refused, except as charged as appears, and defendant excepted.

The Court's charge to the jury is found at p. 71 of the Record, and the exceptions to his charge at p. 73. The latter are as follows, and so much of the charge as is excepted to is respectfully assigned as error.

BY A JUROR: The plaintiff cannot recover, if the mill was real estate, because of the form of the action?

BY THE COURT: No, sir; she has not sold any real estate; that would require a deed, which is not shown here to have been given. If the purchasers bargained for real estate, they did not get any.

The counsel for the defendant calls attention to that portion of the charge wherein the Court says, in substance, it is conceded that whatever contract Norwood made would bind Porter. It is not conceded that Norwood, as a partner, had any agency to bind the defendants in the purchase of the mill; and I call your Honor's attention to the letter of J. Morton Poole & Co. You have a request to charge that J. Morton Poole & Co. had given distinct notice that they were the parties in control of this whole matter.

THE COURT: It is conceded in this case that, in this venture about that saw mill, Norwood was a partner.

COUNSEL: In the business, but not in the purchase of this saw mill; we except.

THE COURT: Your point would be well taken if he was mere agent. He being a partner, she could deal as well with him as them, and if they notified her to stop dealing with him and deal with them, he might take it up anew.

COUNSEL: I think not; that is what I except to. I also desire to except specifically to that statement that it is conceded that whatever contract Norwood made with respect to the purchase of this mill, would bind Mr. Porter.

Also to the charge that there is evidence to that effect.

Defendant also excepts to the charge in effect that if Mrs. Graves, in good faith, made this arrangement with Norwood, and Norwood bid it off for the firm, then it would make a contract, under the laws of Georgia as proved here, which would entitle her to recover.

Also, I except to the portion of the charge where it is stated, in substance, that his taking and keeping possession would be a delivery, after the alleged sale.

Also, I accept to that portion of the charge wherein the Court state, in substance, that if Mr. Graves owned this land, and he put this mill upon it, so that it could be moved, it would be, as between this administratrix and his heirs-at-law, personal property, and not real estate.

Also, I except to the charge that, if plaintiff recover at all, she may recover interest at 7 per cent.

And to the statement that the law as to interest, in Georgia, covers this case.

And, I except specifically as to each refusal of the requests submitted to the Court, and each request refused, except as charged, and exception taken to each refusal.

The jury then rendered a verdict for the plaintiff for the sum of \$5,000, and interest amounting to \$8,904.44, which was duly entered.

Points and Argument.

I. The main questions presented by the issues and evidence in this case are:

- (1) Could the plaintiff make a valid contract with the de-

fendants by a private agreement of sale, followed by the form of a public sale as attempted?

(2) Under the Statute of Frauds of Georgia, was there evidence to submit to the jury, of any sale?

II. At the close of the case (Record, p. 69), defendants' counsel requested the Court to instruct the jury that upon the evidence the plaintiff is not entitled to recover a verdict, and the exception to the ruling presents for review the entire evidence. And in considering the question the two sub-divisions above made will conveniently present the law on this branch of the case.

A. Under the law of Georgia the administratrix does not become the legal owner of the property of the deceased. Code, § 2483.

S. W. R. way Co. vs. Thomason, 40 Ga., 409.

"Very many of the old common law distinctions between real and personal property in the administration of the estates of deceased persons is done away with by our law.

"Realty is assets for the payment of debts. The administrator may sue for it (Code, § 2449), and in some cases he may even sue the heir for realty (Section 2450).

"So as to personal property, *the heir may compel the administrator to deliver to him the specific property* if there be no necessity to dispose of it. And he is entitled to an attachment to compel its delivery (Code, § 2558).

"When practicable the ordinary may order a distribution of the estate in kind (Code, §§2543 and 2545).

"Under these changes in our law we see no reason why the heirs may not file this bill to procure from the present claimants the specific effects illegally sold by the administrator, of which they would have been entitled, if they had not been put out of his hands, to a distribution in kind."

B. The administrator has power to sell in one way only. The Code of Georgia §2555 (old Code, § 2514) provides:

"All sales by administrators (except of annual crops sent off to market and of vacant lands) shall be at public outcry, between the hours of ten o'clock A. M. and four o'clock P. M.; nor shall any sale be continued from day to

“ day unless so advertised. *Good faith* is required of the
 “ administrator in all cases, that the property be sold in
 “ such manner and quantities as shall be deemed most ad-
 “ vantageous to the estate.”

The two requirements of this Act are a *public sale* of the
 intestate's property, and *good faith* in the administrator that
 the property be sold in the most advantageous manner.

In NEAL vs. PATTEN (40 Ga., 369) the Court says:

“ It is the positive provision of our statutory law that
 “ sales by administrators and executors shall be at public
 “ outcry, except sales of annual crops sent off to market,
 “ and of vacant lands; and in case of sales by direction
 “ of a will, where the will directs or permits a private sale
 “ (Code, §§ 2514, 2526, 2412). * * However it may be
 “ true, as contended, that the purchaser is not bound to see
 “ to it that the administrator is acting under the order of
 “ the ordinary, as required by § 2513 of the Code, it is cer-
 “ tainly true that *the purchaser is bound to see to it that the*
 “ *sale is by public outcry.*

“ The purchaser is bound to see that the sale is *apparent-*
 “ *ly* under the prescribed forms. *A private sale, when the*
 “ *law requires a public one, is plainly and notoriously not*
 “ *apparently, under the prescribed forms. And such a sale*
 “ *of property required by law to be sold at public sale, con-*
 “ *veys no title at law*” (Code, § 2586).

S. W. R'way Co. vs. Thomason, 40 Ga., 409:

“ If the administrator do not sell at public sale, as he is
 “ not apparently proceeding to sell under the prescribed
 “ forms, the purchaser is charged with notice.

S. P. Jackson vs. Williams, 50 Ga., 554.

Worthy vs. Johnson 8 Ga., 244:

“ It is conceded on all hands that executors and adminis-
 “ trators in making sales *must* comply with the statutory
 “ provisions authorizing them in every essential direction,
 “ otherwise the interests of heirs and creditors will not be
 “ precluded.

Worthy vs. Johnson 10 Ga., 361:

“ The sale by executor and executrix in January, 1839,

“being a nullity, and so declared by this Court (8 Ga., 236),
 “the *title* in the property was not divested. On the con-
 “trary, it was the right and duty of the executor and ex-
 “ecutrix to have instituted suit forthwith against the pur-
 “chasers to have recovered the negroes; nor would they be
 “estopped in their *trust* character from maintaining the
 “action, the law looking upon the *void* sale as their indi-
 “vidual act.

S. P. Goldsmith vs. Coleman, 57 Ga., 427.

Ventriss vs. Smith, Admr., 10 Peters, 161.
 Action of detainue to recover five negro slaves.

“We assume in the consideration of the case that Lovic
 “Ventriss was a *bona fide* purchaser without notice, and
 “rest the question entirely upon the want of authority
 “in the administrator of Clark, to sell the slaves. * * *
 “The Statute of Alabama (Laws Ala., p. 334) declares that
 “it shall not be lawful for any executor or administrator to
 “dispose of the estate of any testator or intestate at private
 “sale, except where the same is directed by the will of the
 “testator, but that in all cases where it may be necessary
 “to sell the whole or any part of the personal estate, appli-
 “cation must be made to the Orphans' Court for an order
 “of sale, which sale is required to be at public auction, after
 “giving notice thereof as pointed out by the Statute.

“The sale of these negroes, although *bona fide* and for a
 “valuable consideration, was not made according to the
 “provisions of this law. It was a private sale, and made
 “without any order from the Court. * * * The
 “sale was then not only without authority, but in express
 “violation of the provisions of the Statute.

“Such a sale cannot be supported upon any principles of
 “law. * * * The law in this class of cases is well-
 “settled that executors and administrators in making sales
 “of property must comply strictly with the requisites of
 “all statutory provisions on the subject. * * *
 “Authority given to an executor and administrator to sell,
 “is a personal trust and must be strictly pursued, and if
 “they transcend their authority in any essential particular,
 “their act is void.” 4 Johns. Ch., 368; 6 Conn. Rep., 387.

“It was a maxim of the Civil Law that *nemo plus juris*

" *in alium transferre potest quam ipse habet*, and this is a plain dictate of common sense. * * * And although the defendant's testator was a *bona fide* purchaser for a valuable consideration, and without notice, the sale being without authority and against law, he acquired no title that will bind the property against the party who has right."

S. P. Cable vs. Martin, 1 How (Miss. Rep.), 561.

C. Comparing the above statutory provisions and the decisions of the Courts upon them, with the requests to charge, refused by the Court (Record, p. 70) it will appear that the learned Judge allowed this case to go to the jury upon a false idea of the legal rights of the defendant.

(1) The question presented was whether an executory contract of sale, made in violation of the law, could be enforced, and whether the defendants could be compelled to pay the plaintiff for property to which *they* could acquire no title from the plaintiff.

The view taken by the Court, and presented in the charge to the jury, was, that down to the time of plaintiff's visit to Georgia, there had been nothing in the transactions between the parties that amounted to an agreement of sale (Record, p. 72), and that it was by virtue of the conversations of Norwood and his bidding at the time Thompson appeared, in connection with the possession of the mill by Norwood, that the jury might find the evidence to sustain a verdict for the plaintiff (Record, p. 72).

The Court did charge that there was no proof of any memorandum or entry by any auctioneer, in writing, which would satisfy the Statute of Frauds (Record, p. 70), but that it was a question for the jury whether there had been a *delivery* which would satisfy the Statute of Frauds.

In denying the motion for a new trial, the learned Judge put himself on record as follows :

" It was objected that this was not a sale at such public outcry as the law required, and this objection was thought to be well founded for the reason that the outcry would seem to be to the parties named and not to parties generally who might wish to bid. *It still seems that this was not good as a sale at public outcry*" (Record, p. 77) and

he sustains the verdict on the sale by private contract found by the jury, on the theory that the plaintiff had the *legal* title, and what right *she* had would pass by her sale.

D. But without the alleged sale at auction there was no contract of sale, and if there was not evidence on which the jury could find a *delivery* of the mill there was no evidence of any sale.

Code of Georgia, § 1950, provides:

“To make the following obligations binding on the promiser; the promise must be in writing, signed by the party to be charged therewith, or some person by him lawfully authorized, viz.: * * *

“7. Any contract for the sale of goods, wares and merchandise in existence, or not *in esse*, to the amount of fifty dollars or more, except the buyer shall *accept* part of the goods sold and *actually receive* the same, or give something in earnest to bind the bargain or in part payment.”

E. In construing this section this Court will accept the construction put upon it by the Courts of Georgia.

In *Bowers vs. Anderson*, 49 Ga. 146, the Court says:

“The intent of the statute was to prevent the enforcement of contracts above a certain value, unless the defendant could be shown to *have executed* the alleged contract by partial performance as manifested by part payment or part acceptance, or unless his signature to some written note or memorandum of the bargain—not the bargain itself—could be shown.

“Or in other words the rule may be said to be that in order to make such a parol contract binding so as to pass title *there must be something beyond the mere words of the contract*. To hold that the statute could be satisfied by the parties to the contract, verbally stipulating in the contract and as part of it, that the goods should be considered as held by the seller as bailee for the purchaser, or that the price should remain with the buyer as the depository of the seller would destroy its whole virtue.

“It would allow a contract to be enforced which at last would only exist *in words*—the words that made it, without *an act* by either party toward its *performance*, or with-

"out a line of writing to prove it. The statute requires the
"one or the other."

Shindler vs. Houston, 1 N. Y., 261.

Rogers vs. Phillips, 40 N. Y., 524.

Stone vs. Browning, 51 N. Y., 211.

Cooke vs. Millard, 65 N. Y., 368.

Stone vs. Browning, 68 N. Y., 598.

F. Applying the foregoing exposition of what *acts* of acceptance will satisfy the statute of frauds to the present case and we find the mill, the subject of the alleged sale, already in the possession of Norwood as a tenant, and used by him under the permission of the plaintiff (see her letter of December 26, 1865, Record, p. 20. "You can run the mill "by the words you had from me by the hands of Mr. Pusey until I advise you from the mill or via your agent in "Georgia)," and the only *act* of which there is any evidence is in Thompson's statement, that after the alleged sale "Norwood went back to the mill" (Record, p. 34) and Norwood's (p. 56). "We continued to operate the mill under the previous permission until about the first of November, 1866, and this occupation was not in pursuance of any contract of sale, but was in pursuance of the conversation I had with Mrs. Graves, as previously testified to."

(1) Was there in this evidence sufficient for the jury to find a "receipt" and "acceptance" by the defendant?

(a) Upon the solution of this proposition depends the correctness of the Judge's refusal to instruct the jury that there was not evidence sufficient to entitle the plaintiff to a verdict (Record, p. 69).

A motion of this character is the subject of an exception. "If the evidence is not sufficient to warrant a recovery it is the duty of the Court to instruct the jury accordingly."

Schuchardt vs. Allen, 1 Wall, 369.

Insurance Co. vs. Folsom, 18 Wall, 251.

Improvement Co. vs. Munson, 14 Wall, 148.

Bridges vs. N. London R'way Co., L. R., 7 Eng. and Irish Ap., 221.

Oscanyan vs. Winchester Arms. Co., 103 U. S., 261.

(b) Was the evidence of such a character as required its submission to the jury?

The charge of the Judge is—

“Then if you find that Norwood continued the possession of the mill (they were there at the mill when this transaction was had); that Norwood then took the mill, understanding and giving the plaintiff to understand that he took or continued such possession under that purchase, and he understood and she understood that he was holding it for the firm as purchasers, and he did so hold it for any length of time, then the mill was delivered to the firm and they became bound to pay for it. (Record, p. 72).

Defendant excepted to this charge. (Record, top of page 74).

The true rule is laid down in Story on Sales, § 277:

“If there be a sale of goods which are already in the possession of the vendee, and his *conduct* in dealing with such goods is *wholly inconsistent* with the supposition that his former possession continued unchanged, as if he sells or dispose or attempt to sell or dispose absolutely of the whole or any part of them he may properly be said to have accepted and received such goods.

§ 278. “But the *acts* of the parties must be in such a case *wholly unequivocal*. * * * Indeed, in all these cases the Court will construe the statute strictly, and in those cases only will a constructive delivery be considered as sufficient, where either actual delivery is symbolically given or where the circumstances so *unequivocally* indicate an intent to make a final delivery on the one side and an acceptance on the other *as to be* INCONSISTENT with any other interpretation.”

Chitty on Contracts (10 Am. Ed.), 421.

Lilly White vs. Devereaux, 15 M. and W., 285.

There was nothing in the evidence of Norwood's acts or words inconsistent with the prior possession as tenant, and consequently nothing on which the jury could base its ver-

dict that he had received and accepted the mill as purchaser.

This was not the case of a continued possession which could only be justified by a holding as purchaser. The defendants held as tenants at will and notified the plaintiff when they ceased using the mill and asked her to take charge of it, (Record pp. 52, 57) and left it intact (p. 48).

III. The defendants Porter & Poole notified the plaintiff that they were the responsible partners with whom she must deal, and in effect warned her that Norwood had no power to bind them by a purchase of the mill without their approval. (Record p. 20, letter of December 21, 1865.) The language is "Though Mr. Norwood is a partner and must be consulted, we are the responsible parties in the concern and control all the decisions."

Upon this the Court was requested to charge.

(1) "That Norwood had no authority to bind the defendant by a purchase of the mill.

(2) "That although a partner, Norwood's authority was limited and the limitation known to the plaintiff, and that any purchase of the mill by him being in excess of his authority, did not bind the defendant.

The Court refused to charge either of these requests (Record, pp. 70, 71), and again at p. 73 the attention of the Court was drawn to this letter, and the Court's observations show its views upon this proposition.

The learned Judge in reviewing this portion of his charge on the motion for a new trial concedes his error of law (p. 75), but undertakes to justify it by the admissions of the answer (p. 16), wherein defendant admits "that he and the defendants Poole & Norwood were interested together in the business of sawing lumber, and contemplated and intended to procure by lease or purchase, or erect "a saw mill," and the concession at p. 55 that the defendants were partners.

It must be remembered that just before the plaintiff started South to make this sale, she had these final words from J. Morton, Poole & Company. "We are advised that

"the title is not in you, and that you cannot legally convey
 "it hence our offer to purchase becomes void" (Record,
 p. 25, letter of February 15, 1866), and that the only person
 they had authorized her to deal with was "W. S. Bassinger,
 "attorney at law in Savannah, and upon your satisfying
 "him that all is right, he will give you a draft, &c." (p. 23,
 letter of January 8th, 1866,

A. Upon the above facts, in no wise disputed, the learned
 Judge was bound to charge as requested.

The language was unambiguous. "Norwood is a partner
 "and must be consulted, but *we* control all the decisions,"
 and the reason given is, "we are the responsible parties in
 "the concern," we pay, we decide, true we consult him,
 but it all ends as we conclude. Don't waste time with Nor-
 wood, he can't determine anything, he can only advise us.
 This is the plain English of their letter.

B. The law of the requests was sound.

1 Parsons on Contracts, p. 179.

Story on Partnership, §§ 128, 130.

Gow on Partnership (3d Ed.), p. 52,

Lindley on Partnership, Vol. 1, p. 329 and see p. 403.

(Elwell's edition, 1881.)

"The continuance of the partnership is not inconsistent
 "with a notice by one partner that, as to some particular
 "matter, he will not be bound by the acts of his copartner."

King vs. Sarria, 69 N. Y., 28.

Leavitt vs. Pickering, 3 Conn., 125.

Yeager vs. Wallace, 57 Penn., 365.

IV. This mill was shown to be an erection on real estate. It
 was a building, an open shed, of wood, sixty feet long, under
 which the machinery was placed (p. 34), and there was a cistern
 or well to supply the engine with water (p. 48). There was an
 acre of land occupied by the mill and mill yard (p. 35). The
 ownership of this real estate was not shown by any evidence. At
 p. 32 the Court instructed the jury that statements of wit-
 nesses that it belonged to one John H. Mattox were not evidence
 of title to the land. Nor could the letter of defendants of Feb'y.
 15, 1866 (p. 25), nor the alleged statements of Norwood (p. 39),
 furnish such evidence.

The plaintiff failed to give any evidence of the agreement with Mattox alleged in her complaint (Record, p. 13), and failed to show any title to the land.

A. Defendant requested the Court to charge:

(1) That there was no evidence as to who owned the land on which the mill stood. Refused.

(2) Any erection, whether it be permanent or capable of separation and removal from the soil is presumed to become affixed to the soil, and the burden of proof is upon the party claiming that it is not affixed, to establish the fact. Refused except as charged.

(3) That the presumption is, that as between the heirs and the administratrix, the mill was real estate or land. Refused except as charged. (Record, p. 71.)

The Court charged that *generally a saw mill* would be real estate. "A portable saw mill not attached to the land nor intended to be, would be personal property. If the plaintiffs intestate owned the mill *and not the land it was on*, and it was a movable thing and intended to be such and not attached to the land, so but it could be removed without injury—substantial injury to the land—and Norwood, as one of those partners agreed it was personal estate, and should be treated as such in the sale from the plaintiff to them, and she relying on that agreement in good faith towards the interests of the estate made this sale, then it would be a sale of personal property. (Record, p. 71.) If the purchaser bargained for real estate they did not get any" (p. 73). This charge was error.

Etting vs. The Bank, 11 Wheaton, 59.

B. The defect in the plaintiff's case consisted in the want of evidence to show that *Mattox* owned the land and had made the agreement alleged, and in default of such evidence, the presumptions of law which defendant invoked, came in to establish that the mill was *real estate*.

(1) The mere fact of possession raised a presumption of ownership in fee in Graves.

Ricard vs. Williams, 7 Wheaton, 59.

Jackson vs. Winslow, 9 Cowen, 17.

(2) And the saw mill—consisting of *shed, engine, cistern* and sawing machinery was, presumably, a fixture.

Smith vs. Benson, 1 Hill 178.

Potter vs. Cromwell, 40 N. Y. 281.

(3) This presumption is strongest between the heir and administrator.

Elwes vs. Maw, 3 East, 37.

Van Ness vs. Pacard, 2 Peters 143.

McKinne vs. Hammond, 3 Hill (S. C.) 331.

House vs. House, 10 Paige, Ch 162.

(4) The jury were permitted to determine *that* this mill was personal property without evidence to inform them and without instruction to guide them.

It is clearly a mixed question of law and fact—in which presumptions of fact will prevail unless evidence to rebut the presumption be given, and the existence of such presumptions was matter of law for the Court to instruct the jury. Upon unless there was some evidence to rebut the presumptions, there was no question for the jury and the Court was bound to determine as matter of law whether the mill was real or personal property.

Snedeker vs. Waring, 12 N. Y. 172.

V. At p. 69—The right of the plaintiff to recover “as administratrix,” for a contract made with herself or to recover in her individual right in a suit brought by her in her representative capacity was disputed and the Court refused to rule adversely to such recovery.

The point is not settled by authority in the United States Courts and is now presented for determination.

VI. The rate of interest the jury were instructed to allow was seven per cent., and defendant excepted (p. 74).

Interest, in cases like the present is awarded as *damages*, and not under any contract, therefore, the law of the *forum* must control the rate, and in the United States Courts that rate is six per cent.

Ayer vs. Tilden, 15 Gray, 178.

The Aleppo, 7 Ben., 136.

VII. The admissions and exclusions of evidence prejudicial to defendant and the subject of exception, are stated in the assignment of error, and it will be convenient to take them up for consideration in their order.

(1) At p. 27, Tooke was permitted to testify that on or about April 14th, 1866, a person whom he was not acquainted with and had never seen before or since (p. 29), calling himself "Norwood" made certain requests of him, the substance and tendency of which was to establish the plaintiff's claim that Norwood was the purchaser of the mill.

The importance of this evidence and its strong influence upon the jury, cannot be denied. It lent an air of probability and confirmation to the plaintiff's claim, that could not fail to affect the verdict. In substance, it was that Norwood desired to become the purchaser, and as a means to that end desired to have a legal sale of it by a public sale, and that notices be given.

The defendant did what he could to destroy this evidence after it had been given. He showed that the witness, as ordinary, had certified on January 24, 1866 (about three months before the alleged interview) a copy of the records of the Court in the Graves estate (see p. 30), and Norwood testified that he got the copy from Tooke (p. 58), and Porter testified that Norwood sent them to him (p. 66).

(a) The only possible ground on which the evidence was admissible against the defendant Porter, was that the admissions or declarations of an agent, in the course of his agency, bind the principal; but there must be a foundation laid to make the evidence competent—the agency must be established; and in this instance the agency—that is, the identity of the agent—rests on no evidence.

That the man *called* himself Norwood was not proof of the fact. Such evidence was but hearsay. No oath proved the identity, and no admission conceded it. Norwood swears positively that he did not go to the ordinary and request the order for selling the mill (p. 58).

(2) At p. 28, Tooke was permitted to testify to an authority and direction, given by the plaintiff to Thompson, to make a sale of the mill.

Such evidence was clearly hearsay and incompetent, and as it tended to corroborate the plaintiff's story, must have influenced the verdict of the jury, and the plaintiff, in insisting on it after the objection, showed that she regarded it as material.

(3) At p. 31. The witness was here permitted to usurp the functions of the Court. Whether what was done in the manner this sale was attempted to be made, was *legal*, was the question for the Court to determine; and the answer of the witness that, "so far as his official acts were concerned, he considered them legal," was allowed to go to the jury with its full weight as *evidence* upon that point.

(4) At p. 32. What just bearing the fact that "this mill " was new and first quality, and in all respects a first-class " portable saw mill," had upon the question at issue, viz.: " Did the defendant buy the mill for the agreed price of " \$5,000?" defendants' counsel continues unable to see. That it was intended to have, and had an influence on the jury, is quite plain.

If it was so good they might well say the defendant would not be hurt much if they made him pay this lady the price of it, and as she evidently wanted to sell it very much indeed, it was all the easier for them to bring their consciences to decide she had sold it.

(5) At p. 32. The question was objectionable on both the grounds stated.

(a) The question was leading as well as an unfair one to put, either on an oral examination or upon written interrogatories, and perhaps *worse* on the latter where such advantage might be, and in this case, was taken by an unscrupulous witness to drag in irresponsive matter.

(b) It asserted the fact of a sale having been effected to the defendants which had not been proved, and was the very issue in the cause.

(c) The specific objections to many portions of this answer were that they were incompetent and irresponsive.

The issue is whether a sale had been effected, and the witness was permitted to prove *words* for what the Statute of Frauds requires writing or acts.

(6) At p. 41 and 43, the plaintiff was permitted to testify

to the contents of a written instrument to which there was a subscribing witness, and which she swore she had lost. This instrument was a power of attorney to Thompson to make the sale of the mill to J. Morton Poole, & Co.

(a) At common law the method of proof by a subscribing witness was strictly enforced, and the loss of the instrument could not relax the rule.

Clark vs. Courtney, 5 Peters, 342.

Cook vs. Woodrow, 5 Cranch., 13.

Moore vs. Livingstone, 28 Barb., 543.

Corbin vs. Jackson, 14 Wend, 619.

(7) At p. 43, what the plaintiff said to Thompson about calling on Norwood and about the price was admitted.

(a) What the plaintiff told Thompson could in no manner bind the defendants, and yet it was ingeniously got before the jury in the guise of *instructions*.

(8) At p. 44, the plaintiff was allowed to repeat the contents of a memorandum of sale made by Thompson (also lost).

The Court finally held that there was no sufficient memorandum in writing (p. 70), and should for the same reason have excluded this evidence. It cannot be asserted that it could have no effect upon the verdict of the jury, and whatever effect it had was against the defendant.

(a) Thompson was in no proper sense an *auctioneer*. He was the selected agent of the plaintiff, empowered to sell to *one* person only (Story on Agency, Sec. 27), and was wanting in all those qualities of indifference between the parties essential to make his memorandum the act of the buyer as well as the seller. In exercising his functions the auctioneer is a species of "public agent."

Hicks vs. Wetmore, 12 Wen., 548.

Smith vs. Arnold, 5 Mason, 417.

Bent vs. Cobb, 9 Gray (Mass.), 397.

Bartlett vs. Purnell, 4 A. & E., 792.

(b) There was no proof as to *when* the memorandum was made, and this was essential to plaintiff's case.

Smith vs. Arnold, 5 Mason, 417.

(9) At page 44. The motion to strike out the plaintiff's evi-

dence that she wrote a letter, which was not shown to have been received by defendant, was improperly denied.

(10) At page 63. Mr. Bassinger, the lawyer at Savannah, to whom Mrs. Graves was referred (see letter of Jany. 15, 1865, p. 23), testified, in Oct., 1873, that all his letters, books and papers had been destroyed by fire in 1869. An original letter from himself to J. Morton, Poole & Co., dated March 31, 1866 (which defendants had sent to him to refer to and refresh his recollection by), was produced by him and annexed to his deposition (taken on notice).

Mrs. Graves had already testified, at page 49, that she did not go to Mr. Bassinger at all, but that *Mr. Tooke* wrote to him for her. In the letter produced by Bassinger he states, under date of *March 31, 1866*: "I have a letter from Mr. Tooke, of Thomasville, the ordinary of that county, on behalf of Mrs. Graves. *It takes the position that you have concluded an agreement with her to purchase her mill for \$5,000*; and asks what proceedings I want taken to secure you a proper title."

(a). This much of the letter was competent evidence; it was the statement made by the witness, made on the very day of its receipt, of the contents of a letter proved to have been lost, which letter was written by the acknowledged agent of the plaintiff.

(b). It was material evidence. It showed that the plaintiff *before* her interview with Norwood on April 15 (p. 46) asserted that J. Morton, Poole & Co. had "*concluded an agreement with her to purchase her mill for \$5,000.*" It shows that she went South determined to *FIX* a sale on defendants, and that the steps she took were in pursuance of this resolution, and *not* by reason of anything Norwood did or said. Mrs. Graves was present and *heard* Norwood's deposition taken at Savannah (p. 45), in August, 1873 (p. 56).

Who suggested to her counsel the following question he put to Norwood on p. 58?

"Q. Did not Mrs. Graves at Homerville inform you that "*your firm had bought of her this mill for \$5,000, and that she was then on her way to Thomasville to perfect the sale on her part, by having an order from the ordinary to sell*

"at public outcry to your firm." And repeated again and again on p. 59.

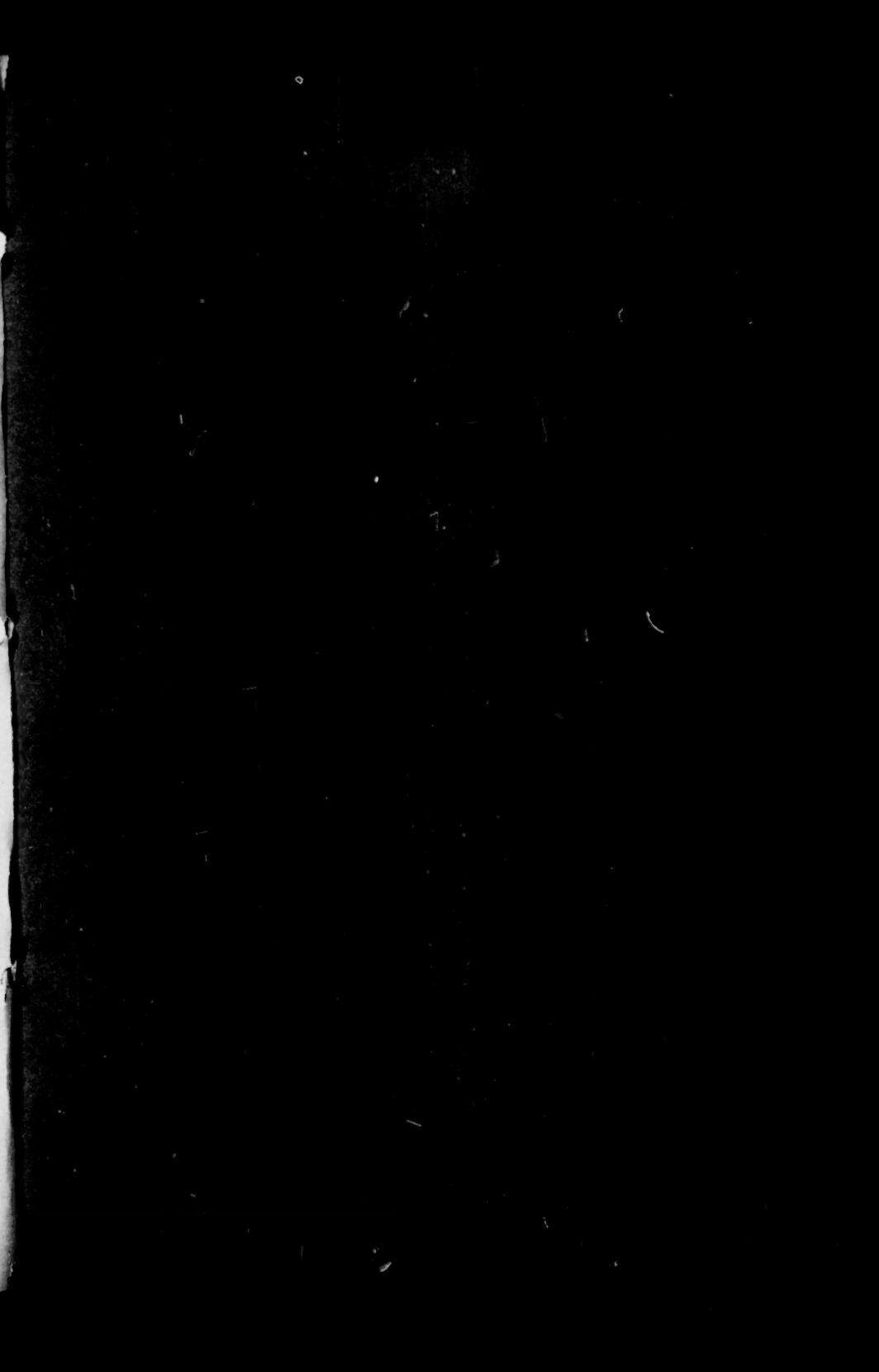
The conversation with Norwood at Homersville was on the *train* and was before March 5th, for on that day she got the order to sell from Tooke (p. 26).

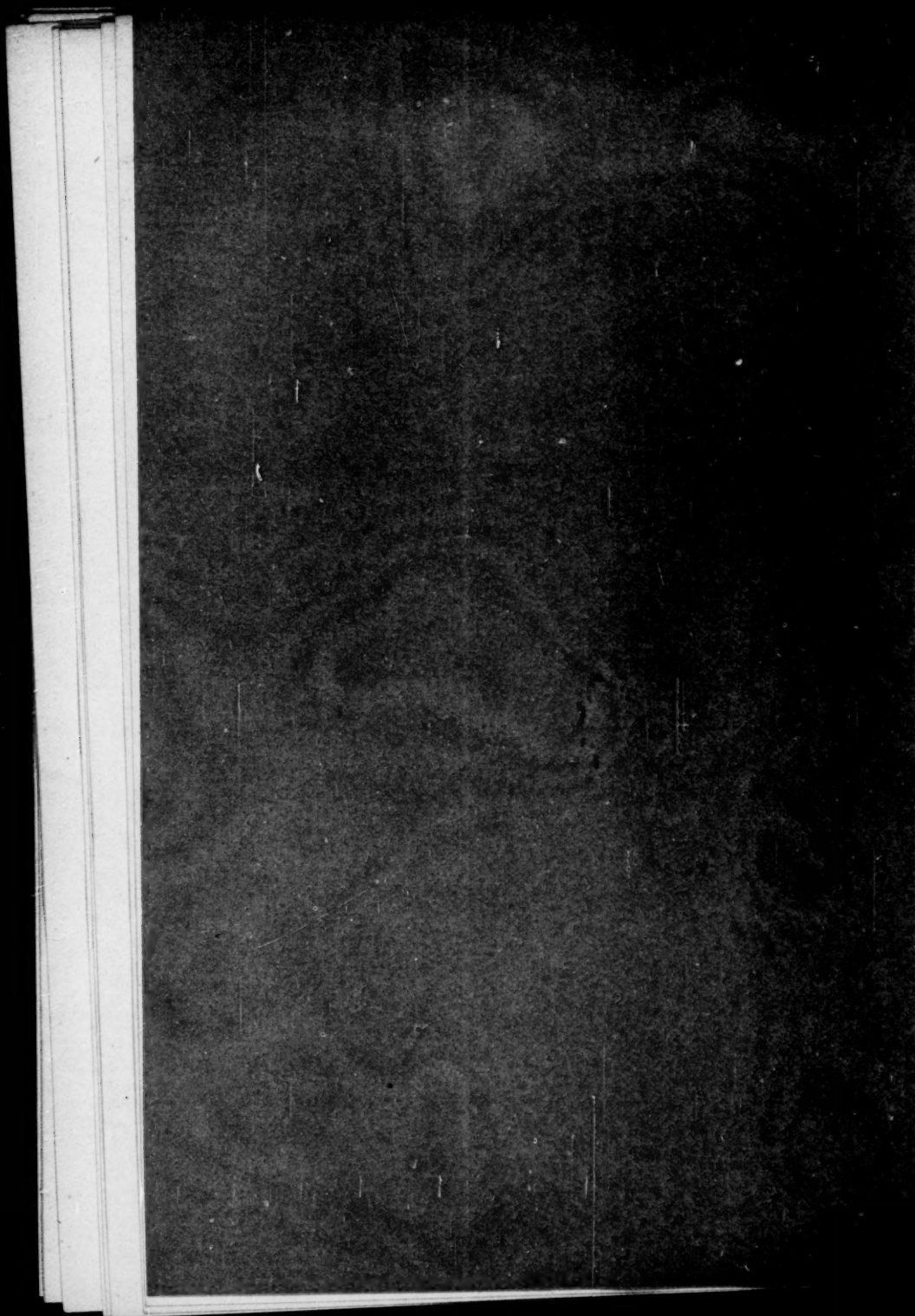
At p. 50. Mrs. Graves had testified that she told Norwood on the cars that she had come South "to perfect a sale of the mill to J. Morton, Poole & Co., *if they wanted it*," and yet in this letter of Tooke's she takes the position that she had concluded a sale.

It is a harsh thing to accuse this woman of a conspiracy, yet this letter tended to prove one on her part, and certainly contradicted her evidence. *Norwood was not responsible* (p. 68), and only J. Morton, Poole & Co. could be made to respond, and plaintiff was resolved to hold them, yet testifies that she had other offers from other parties of the same price (p. 50). "I had an offer from Mr. Edward Thompson of \$5,000. That offer was made while I was there, soon after my arrival, *before* Mr. Norwood came to me." That Mr. Thompson was responsible.

Lastly. The judgment should be reversed and a *venire de novo* ordered.

HENRY J. SCUDDER,
Of Counsel for Plaintiff in Error.







United States Supreme Court.

WILLIAM T. PORTER, IMPEADED, WITH J. MORTON
POOLE AND W. G. NORWOOD,
PLAINTIFF IN ERROR,

vs.

JENNIE L. GRAVES, ADMINISTRATRIX OF CYRUS
GRAVES, DECEASED, DEFENDANT IN ERROR.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

Writ of error to the Circuit Court of the United States for
the Northern District of New York.

The action was commenced in 1872, in the Supreme Court of
the State of New York, by Mrs. Graves, as administratrix of
Cyrus Graves, deceased, against William T. Porter, J. Morton
Poole and W. G. Norwood, by summons. The summons was
served on the defendant Porter, only. He and Poole were
citizens of the State of Delaware, and Norwood, of the State
of North Carolina. Mrs. Graves was a citizen of the State of
New York, and a resident of the County of Cortland, in that

State. On the petition of Porter the suit was removed into the said Circuit Court, and he appeared in that Court.

Pages 1 and 2, of Record.

The declaration is at pages 3 to 6.

The answer of the defendant Porter, is at pages 6 and 7.

The case was first tried in 1876, and a verdict rendered in favor of the plaintiff. This was set aside, (Page 18,) and a new trial ordered on defendant's motion.

The action was tried a second time in June, 1877, by Judge Wheeler and a jury. The jury rendered a verdict in favor of the plaintiff below for \$8,904.44.

Pages 8, 9 and 10.

A case was made with leave to turn the same into a bill of exceptions. On this case a motion was made before Judge Wheeler for a new trial. The motion was denied and judgment ordered for plaintiff on the verdict.

The opinion of Judge Wheeler is at page 74, &c.

Judgment was entered in July, 1878. Page 11.

The case was turned into a bill of exceptions, which extends from pages 18 to 74.

The plaintiff gave evidence, which is found at folios 32 to 69½.

The plaintiff rested. See folio 69, near top of page 55.

The defendant then gave testimony, which extends into folio 82, page 66, and rested.

The plaintiff gave evidence in reply, which extends to folio 86, and again rested.

The defendant gave some further evidence, which is at folios 86, 87.

The defendant's counsel requested the Court to charge various propositions, and took exceptions as stated at folios 87, &c.

The charge of the Court is on page 71, &c.

The suit was brought by the plaintiff, as administratrix of

her husband, Cyrus Graves, deceased, to recover \$5,000, the price of a portable steam saw mill and appurtenances alleged to have been sold and delivered in April, 1866, to the defendants, who were co-partners.

In 1858, the plaintiff and her husband removed from the State of New York to Georgia. He engaged in the lumber business there. In the winter of 1861-2, he transported from the North and put in operation at Homerville, Georgia, the mill in question.

He died in the fall of 1862, and the plaintiff was duly appointed in Thomas County, Georgia, as administratrix of his estate.

Record, page 26.

She subsequently removed to their former residence in Cortland County, N. Y., where she was also appointed administratrix of his estate.

Record, page 31.

The mill was leased to Messrs. Lovell & Lattimore, by the plaintiff, and this lease expired on the 1st of January, 1866.

See authority to do so, page 29.

In 1865, the defendants were in possession and using the mill under an assignment of the lease from Lovell & Lattimore.

Letter from defendants of December 11, 1865, page 18.

Letter from plaintiff to defendants in reply, dated December 13, 1865, page 19.

Testimony of Norwood, page 56.

Poole, Porter & Norwood were co-partners in the business of sawing and manufacturing lumber at Homerville, in Georgia.

Answer of Porter, page 7.

Testimony of Norwood, page 56.

Testimony of Porter, page 66.

In the summer and fall of 1865, the defendants applied to the plaintiff to sell or lease them the mill. She expressed a

willingness to sell for \$5,000, but in substance declined to lease it.

Letter of Norwood to her, of July 1, 1865, and her replies, pages 53 and 54.

Letters set out on pages 18 to 25, inclusive.

Testimony of Pusey, page 64.

Testimony of Norwood, at the bottom of page 57.

The negotiation as to the sale of the mill continued by letter until the last of February, 1866, when Mrs. Graves went to Georgia.

On her way from Savannah to Thomasville, she saw and conversed with Norwood; and he subsequently came to Thomasville, and there saw her and Mr. Tooke, the Ordinary by whom letters of administration had been granted to her.

Testimony of Mrs. Graves, pages 38 to 40 inclusive.

Testimony of Tooke, page 27, fol. 38.

The Ordinary, Mr. Tooke, made an order authorizing the plaintiff, as administratrix, to sell the mill. He also prepared notices of the sale to be made on the 30th of April, 1866.

Pages 26 to 28.

The notices were duly posted, and on the 30th of April, 1866, Mr. Thompson testifies, that as attorney for the plaintiff, he sold the mill at public auction, at Homerville, to the firm of J. Morton Poole & Co., for \$5,000, Norwood bidding that sum for the same, and that being the highest sum bid.

Testimony of Thompson, pages 32, 33 and 34.

At the time of sale no part of the purchase price was paid. Norwood told the plaintiff that if his partners did not send him the money so he could pay on the day of sale, they would remit the amount to her.

Page 39, fol. 51.

She returned to her home, in New York, early in May, 1866, and twice wrote the firm at Wilmington. She received no reply.

Page 44, fol. 57.

The defendants were in possession of and using the mill at the time of the sale.

Page 40.

They continued to possess and use it as their own after the sale. The first Mr. Graves heard from them after the sale, was the receipt of the letters of November 1 and November 28, 1866, set out on page 52.

She subsequently called on the defendants at Wilmington, and failing to get pay, this suit was afterwards brought. She has never had anything to do with the mill since the sale.

First. The mill in question did not become a part of the real estate on which it was placed and used. It was, and continued to be, personal property.

1st. It was a portable steam saw mill owned by Cyrus Graves, deceased. It was constructed and intended to be moved from place to place, and used wherever there was timber to be sawed into lumber. It was not intended to be, and was not, in fact, affixed or attached to the land of Mr. Mattox. It was not intended that it should remain permanently on this land. It was never claimed by Mr. Mattox, or his grantees, that this mill belonged to them or was a part of the real estate.

Letter of defendants, February 15, 1866, page 25.

Letter of plaintiff, February 26, 1866, page 25.

Testimony of Thompson, page 32.

Testimony of Thompson, on cross-examination, page 34.

Testimony of Mrs. Graves, pages 36, 37; p. 46, fol. 60.

2d. On the evidence, the jury properly found that the mill was personal property.

Charge of the Court, page 71, fol. 89.

Opinion of Judge on motion for new trial, page 75, fol. 93½.

Code of Georgia, 1873, revised by Irwin, Lester and Hill, sections 2218, 2219.

Murdock vs. Gifford, 18 *N. Y. R.*, 28.

Ford vs. Cobb, 20 *N. Y. R.*, 344.

Wade v. Johnson, 25 *Georgia R.*, 331.

3d. In determining the question whether a machine is a fixture or not, the intention of the party who attached it to the realty is an important element to be considered. (See *Porter, Receiver, v. Cromwell*, 40 *N. Y. R.*, pp. 287, 293.)

On the evidence in this case, no one would believe that Graves intended that this portable saw mill, worth more than \$5,000, was to become a part of the land of Mr. Mattox; or, that Mattox so intended or expected.

Second. The saw mill was offered for sale and sold by the plaintiff and purchased by the defendant as personal property. There can be no well founded claim on the evidence that the plaintiff ever claimed to own or offered to sell the land on which the mill stood, or that the defendants, in April, 1866, supposed or believed that she offered or they purchased any land in connection with the saw mill.

1st. When the defendant suggested that they supposed she offered anything but the saw mill as an article of personal property for \$5,000, she promptly answered them that the mill was personal property; that she offered this as such for \$5,000; that

the land on which it stood belonged to Mattox or his grantees.

Letter of defendants of January 15, 1866, page 23.

Letter of plaintiff, in reply, February 12, 1866, pages 23 and 24.

Letter of defendants, February 15, 1866, pages 24, 25.

Letter of plaintiff, in reply, February 26, 1866, page 25.

2d. The defendants knew that plaintiff sold the mill as personal property. The mill had been leased by plaintiff, as administratrix, as personal property to Lovell & Lattimore, for the years 1864 and 1865. The defendants, in 1865, had become the assignees of this lease which expired January 1st, 1866, and were in possession of the mill under it when they opened negotiations to purchase it.

See letters between parties, pages 18, 19, 20.

Also letter of Norwood, July 1, 1865, Exhibit E, p. 53.

Norwood, in 1865, was well acquainted with the mill, and knew all about it. He was at Homerville, and a partner with the other defendants, Poole & Porter, in operating the mill there.

He wrote the letter Exhibit E, page 53, in the interest of the firm.

See his Testimony, page 58, fol. 73.

He received the letter Exhibit F, page 53, from plaintiff, in which she declined to lease the mill, but expressed her readiness to sell it.

See his testimony bottom of page 57 and top of page 58.

J. Morton Poole & Co. afterwards, opened correspondence with the plaintiff at the request of Norwood.

See his testimony, page 58, fol. 73.

See his testimony, page 56, fol. 70.

J. Morton Poole had, in November or December, 1865, visited Homerville, where they were operating this mill.

See testimony of defendant Porter, page 66, near top.

In March, 1866, and before the sale at auction, Norwood said

to the plaintiff, in answer to her statement in reference to the land on which the mill stood, "Mrs. Graves, I have been operating your mill for six months on a lease from Lovell & Lattimore, and I know you don't own the land; I know the land is owned by John H. Mattox."

See testimony of plaintiff, page 39, near the bottom of page.

Norwood does not deny this or pretend she offered to sell the land on which the mill stood.

See all his testimony.

3d. The jury, on all the evidence, under proper instructions, found that the mill was sold by the plaintiff and purchased by the defendants as personal property. There was no mistake or misapprehension on this point. Both parties knew it was and treated it as personal property. Both parties knew that no land was assumed to be sold with the mill.

See charge of the Court, page 71, fol. 89.

Third. Norwood had authority to bind Porter and Poole, in the negotiation for and purchase of the saw mill.

They were co-partners in sawing and manufacturing lumber, at Homerville, Georgia, and required the mill in that business.

This is alleged in the declaration.

See same, page 4, fol. 11.

The defendant Porter, who alone was served with process, admits in his answer: "that he and the defendant Poole and Norwood were interested together in the business of sawing and manufacturing lumber at the time mentioned in the complaint, and contemplated and intended to procure by lease or purchase, or erect a saw mill in the neighborhood of Homerville."

Answer, page 7.

The answer alleges sundry defenses, but it does not deny that the defendants were co-partners, or set up that Norwood was not authorized to purchase the mill.

See same, pages 6 and 7.

The defendant Porter testifies that he, Poole and Norwood were partners in this business, at Homerville.

Testimony of Porter, page 66, near top.

Norwood testifies to the same thing.

See his testimony, page 56.

His cross-examination, page 57.

The fact that they were partners in this business was expressly admitted on the trial.

Page 55, at top.

Prior to the sale and purchase, Norwood was carrying on this business, as the active partner, with this mill for the firm, and after the purchase of the mill for and in the name of the co-partnership he continued for months to use it as their property in carrying on the same business.

It is confidently submitted that he had authority to purchase the same for and in the name of the firm.

Norwood, as a partner in the business of sawing and manufacturing lumber, bound all the members of the co-partnership in purchasing this saw mill required for the business.

Story on Partnerships, sec. 101 to 105.

Winship et al. v. Bank of U. S., 5 Peters, 529, 561.

Fourth. There was a fair and honest sale, and a delivery of the mill by the plaintiff to the defendants, in April, 1866. This has been found by the jury on sufficient evidence, under instructions from the Court, quite as favorable to the defendants as the law authorized.

See charge, from the bottom of page 71 to the end of the charge.

1st. The evidence showed that in 1865, while the defendants, as co-partners, possessed and were using the mill, under the lease which expired on the 1st of January, 1866, they applied to the plaintiff to lease it for a term, and she declined to lease, but expressed a willingness and desire to sell it for the price of \$5,000.

See letters of July, 1865, page 53.

Letters of December, 1865, pages 18 and 19.

The defendants said to her they thought the price reasonable. Letter of defendants, dated December 21, 1865, near top of page 20. Pusey, their agent, said the same.

Testimony of Mrs. Graves, page 37.

The defendants then raised queries as to the plaintiff's authority to sell the property, and suggested to her that, as she was going to Georgia, she should lay the evidence of her right to dispose of the property "before our friend, W. S. Bassinger, attorney at law, in Savannah, and upon your satisfying him that all is right he will give you a draft on us for the amount, or the payment may be arranged in any other way you may prefer. It is right and necessary that we are assured that the property is ours when we have paid for it."

Letter of defendants of January 15, 1866, page 23 of Record.

See also letter of defendants of February 15, 1866, to the same effect, and in which they speak of Mr. Bassinger as "our attorney." Record, page 24.

The plaintiff then went to Georgia, and on her way from Savannah to Thomasville, saw Norwood at Homerville; she said to him, in substance, that she was on her way to Thomasville, where letters of administration had been issued to her to perfect the sale of the mill; and requested him to come there and satisfy himself that her title to and right to sell the mill was all right. He said he would come in a short time, but wished her to wait till he could see Mr. Bassinger, and learn what should be done.

Testimony of Mrs. Graves, page 38, fol. 50.

A few weeks after, Norwood came to Thomasville. He said he had seen Mr. Bassinger, and that to make a perfect title to the mill he thought it best to sell the mill at "public outcry," &c. He said he would bid the mill off for the firm at such sale.

Testimony of Mrs. Graves, pages 38, 39.

Norwood, on the same occasion, saw the Ordinary of Thomas County, at Thomasville. He said he had been advised by a lawyer that the mill be sold at public sale. He wanted a legal sale, and that notices be given, and the Ordinary told him it should be done.

Testimony of Tooke, page 27, fol. 38.

Bottom of page 29 and top of page 30.

The Ordinary made, on the application of plaintiff, an order authorizing her to sell the mill.

Pages 26 and 27.

On the occasion when Norwood visited Thomasville, the Ordinary prepared the notices for the sale of the mill on the 30th of April, 1866, at Homerville, and sent them to be posted there.

Testimony of Tooke, pages 27 and 28.

Edward O. Thompson was employed and authorized by plaintiff to go to Homerville and make the sale by auction for her. He was directed to and did inform Norwood that he came to make the sale for plaintiff. He did, on the 30th of April, 1866, between ten and half past eleven o'clock, A. M., offer and sell the mill at public auction or outcry, and the same was bid off by Norwood for and in the name of the firm, at the sum of \$5,000, and was struck off to the firm at that sum, which was the highest amount bid.

Testimony of E. O. Thompson, pages 32, 33, 34 and 35.

Thompson was empowered, by a written power of attorney, prepared by the Ordinary and executed by the plaintiff, to make the sale. He made a memorandum of the sale on the back

of the power of attorney and returned it to the plaintiff. The power of attorney and memorandum were lost.

Testimony of Tooke, page 28.

Testimony of Thompson, page 35.

Testimony of Mrs. Graves, page 40.

Testimony of Mrs. Graves, pages 43 and 44, fol. 56.

In the interview with plaintiff, at Thomasville, Norwood stated that if his partners at Wilmington sent him the money by the day of sale he would then pay the price. If not, then they would remit it to her.

Testimony of Mrs. Graves, page 39, fol. 51.

The plaintiff returned to her home, in New York, about the 6th of May.

Page 44, fol. 47.

The defendants continued to possess and use the mill, after the sale, as owners. They made no arrangement for leasing, or as to rent.

The only testimony in conflict with the facts, circumstances and testimony, above referred to, is the deposition of Norwood, in which he denies that he or any one else bid off the mill at the sale by Thompson, at auction.

See his testimony on direct-examination, pages 56 and 57.

On cross-examination, pages 57 to 61.

This testimony is in conflict with the conceded facts of the case, and the direct testimony of Mrs. Graves, Mr. Tooke, the Ordinary, and Thompson, who made the sale at auction.

The auction sale was made at Homerville, where Norwood was carrying on the business; his workmen and acquaintances were present.

The only witness he calls to corroborate him in his improbable story is Cooper, who says he was, in 1866, in the employ of defendants in operating the mill, and when examined as a witness a policeman in Savannah.

See his testimony, pages 62 and 63.

The testimony of Cooper tends more strongly to contradict and cast suspicion on the testimony of Norwood, as to the sale at auction, than to sustain him.

See Norwood's testimony, pages 56 and 60.

See Cooper's testimony, page 62.

It was certainly a question for the jury what the truth was as to the sale at auction, and their finding is conclusive on this point. The Judge who tried the case was satisfied with the verdict, and this Court will not disturb it.

2nd. This sale was not void under the statute of frauds of Georgia, as insisted by the defendants at the trial. The Court below ruled and charged correctly on this point.

See request and exception by defendants counsel, page 70.

See charge of Court, page 72.

See exception, page 74.

See opinion of Court on motion for a new trial, page 76, fol. 95.

The statute of Georgia, bearing upon this question, is as follows :

Section 1,950 of Code of Georgia, herein above cited, declares that to render certain obligations binding they must be in writing, signed by the party to be charged therewith, viz : "7. Any contract for the sale of goods, wares, and merchandise in existence, or not *in esse*, to the amount of fifty dollars or more, except the buyer shall accept part of the goods sold and actually receive the same, or give something in earnest to bind the bargain or in part payment."

The next section is as follows :

"§ 1,951. The foregoing section does not extend to the following cases, viz :

1. When the contract has been fully executed.

2. When there has been performance on one side accepted by the other in accordance with the contract.
3. Where there has been such part performance of the contract as would render it a fraud of the party refusing to comply if the Court did not compel a performance."

There was a legal delivery to and acceptance by the defendants of the property in question. The evidence fully authorized the jury to and they did so find.

The defendants were in the actual possession and use of the mill during the negotiation for its purchase, and at the time of the sale at auction. They bid it off at the auction sale at the price which they had said during the negotiation was satisfactory. The sale was made in the manner in which their counsel had advised and they desired, that they might get good title as purchasers.

During the negotiation the plaintiff had declined to lease the mill except on terms which the defendants stated they would not for a moment entertain.

Defendant's letter of December 21, 1865, page 19.

Norwood knew she declined to lease the mill.

Norwood's testimony, page 57, at bottom.

He bids off the mill at the auction for and in the name of his firm, and promises the amount shall be remitted to her. They continue to actually possess and use the mill, after the auction sale, for months, without a suggestion or hint to the plaintiff that they do so otherwise than as purchasers and owners; not a suggestion that they retain the possession as tenants, or that the property is at the plaintiff's risk, or as to compensation for its use.

Surely the jury were authorized on these and other facts and sworn testimony in the case to find that the defendants accepted, received, and retained the property as owners, under and by virtue of the sale. This made a perfect delivery to and accept-

ance of the property by the defendants within the statute of frauds.

Sections 1,950 and 1,951 of Code of Georgia, supra.

Benjamin on Sales, 2 ed., pages 113, 131, &c.

Edan v. Dudfield, 1 Adolph & Ellis, N. S., page 302.

Found also in 41 English Com. Law R., page 551.

Story on Bailments, section 297.

3d. There was nothing in the manner in which the sale was made, as found by the jury, which renders it invalid by the laws of Georgia.

See the charge of Court at the bottom of page 71 and top of page 72.

The title of all the personal property of the deceased was vested in the plaintiff, as administratrix, for the benefit of the heirs and creditors.

Code of Georgia, supra, section 2,483.

Sales are to be made under the order of the Ordinary.

Section 5,554 of Code of Georgia..

Section 2,555 of the Code of Georgia, is as follows:

"All sales by administrators (except of annual crops sent off to market and of vacant lands,) shall be at public outcry between the hours of ten o'clock A. M. and four o'clock P. M.; nor shall any sale be continued from day to day unless so advertised. Good faith is required of the administrator in all cases that the property be sold in such manner and quantities as shall be deemed most advantageous to the estate."

Section 2,566 of the same Code is:

"A private sale of land under an obligation to perfect by legal formality, is contrary to public policy, and renders such sale always open to review *at the option of parties at interest.* Sales made prior to December 17, 1859, are legal and valid."

(1.) We insist that the sale in question was a substantial compliance with the law of Georgia, that sales of personal property by administrators shall be at public outcry.

The object of the statute was to guard against frauds upon creditors and heirs. The plaintiff sold according to the directions of the Ordinary, on the notice directed by him.

See order, pages 26 and 27.

See notice, page 28.

The statute requiring the terms of sale to be stated in the notice, was not enacted till after the sale in question.

Laws of Georgia of 1866, page 65, No. 110.

The sale was honest and fair, with the intention of protecting and promoting the best interest of the creditors and heirs. The jury so found.

Charge, pages 71 and 72.

The fact that the plaintiff, before going to the expense of this sale at auction, negotiated with a party that he would bid at the sale at least the amount the property was believed to be worth, does not in any way invalidate the auction sale. There was no agreement that if other parties bid a larger sum than the defendants, such other parties should not become the purchasers and have the property.

(2.) In any view of the case, this sale is valid as between these parties.

The statute does not declare that a fair, honest sale of personal property by an administrator shall be void or even voidable, although not made in accordance with the directions of the statute in question.

Section 5566, above set out, applies only to land.

The Courts of Georgia hold that a private sale of personal property without any public notice or public sale, is not void as between the parties to the sale and purchase.

Nutting v. Thomason, 46 Georgia R., pages 34, 38, 39.

If any one could question this sale, it would be the heirs or creditors of the deceased. They have not done so. Surely, the defendants, the purchasers, will not be, on the facts of this case, allowed to avoid the sale and refuse to pay for the property. When the plaintiff went to Georgia, and could have sold the property to others there, the defendants elected to and did purchase it, and retain and use it till long after she returned to her home in New York; they are now required by law and equity to pay for it. The idea that this estate should, as it must, if the defendants are not compelled to pay for it, lose the entire value of this property, is contrary to justice and fair dealing.

Fifth. It is believed that there was no material error in the rulings of the Court below as to evidence or in the portions of the charge excepted to.

The judgment should be affirmed, with costs.

FRANCIS KERNAN,
Counsel for the Defendant in Error.

14-176

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~326~~ 80

THE FLAGSTAFF SILVER MINING COMPANY OF UTAH (LIMITED), AND ANDREW G. HUNTER, PLAINTIFFS IN ERROR,

VS.

GEORGE CULLINS.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED NOVEMBER 4. 1878.

SUPREME COURT OF THE UNITED STATES.

No. 326.

THE FLAGSTAFF SILVER MINING COMPANY OF UTAH (LIMITED), AND ANDREW G. HUNTER, PLAINTIFFS IN ERROR,

vs.

GEORGE CULLINS.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

INDEX.

	Original.	Print.
Caption.....	1	1
Complaint.....	2	1
Answer of Flagstaff Silver Mining Company.....	10	3
Finding of facts.....	14	5
Order that judgment be entered.....	21	7
Judgment.....	22	8
Notice of appeal.....	25	9
Statement and exceptions.....	26	9
Bond on appeal.....	28	10
Clerk's certificate.....	30	11
Stipulation of counsel as to record.....	32	12
Hearing in supreme court.....	33	12
Judgment of supreme court.....	34	13
Writ of error.....	36	13
Citation.....	39	14
Petition for appeal.....	43	15
Opinion.....	46	16
Bond for costs.....	51	17
Supersedeas bond.....	54	18
Clerk's certificate.....	57	19

1 Be it remembered that on the 10th day of December, A. D. 1877, was filed in the office of the clerk of the supreme court of the Territory of Utah, a transcript of the record and proceedings of and in a certain cause theretofore pending in the district court of the third judicial district of said Territory of Utah, in which George Cullens was plaintiff, and Flagstaff Silver Mining Company of Utah (limited), and Andrew G. Hunter, were defendants, which said transcript was in the words and figures following, to wit:

2 *Complaint.*

District court, third judicial district.

TERRITORY OF UTAH,
Salt Lake County :

GEORGE CULLINS, PLAINTIFF,

vs.

FLAGSTAFF SILVER MINING COMPANY OF
Utah (limited), and Andrew G. Hunter, de-
fendants. }

The plaintiff complains of the defendants, and, for a cause of action, alleges and shows to the court: That the defendant, the Flagstaff Silver Mining Company of Utah (limited), is a foreign corporation, organized under the laws of and located in the Kingdom of Great Britain; and that said corporation during all the times hereinafter mentioned has owned and worked and still owns that certain mine and mining claim, situate in Little Cottonwood Cañon and mining district, Salt Lake County, Territory of Utah, and located and known as the "Flagstaff mine," consisting of twenty-six hundred linear feet in length and with a surface width of one hundred feet for the whole length thereof. That on the 14th day of December, 1873, the defendant, the Flagstaff Silver

3 Mining Company, of Utah (limited), by its duly authorized agent and manager in Utah and the plaintiff herein, made and entered into a contract by which the plaintiff agreed to work for said defendant in and upon its said mine, as a miner, in superintending and directing the working thereof from that time for and during an indefinite time thereafter, and for which work and labor so as aforesaid to be rendered the said defendant agreed to pay the plaintiff at the rate of thirty-six hundred dollars per year for so long a time thereafter as plaintiff should work under said contract. That the plaintiff, in accordance with said contract, worked in and upon said Flagstaff mine as a miner, in directing and superintending the working thereof, on and from the 15th day of December, 1873, to and including the 31st day of December, 1876, continuously, and performed thirty-six and a half months' labor in and upon said mine, and for which said defendant became indebted to the plaintiff in the sum of ten thousand nine hundred and fifty dollars. That during said time the defendant, the Flagstaff Silver Mining Company of Utah (limited), paid to the plaintiff, for and on account of said work and labor, the sum of nine thousand three hundred and fifty dollars, being payment 4 in full up to January 1st, 1876, and the further payment of two thousand dollars to apply on work done in 1876, and that there is still due and unpaid to the plaintiff for said work the sum of sixteen

hundred dollars, and interest thereon, at the rate of ten per cent. per annum from and after the first day of January, 1877. That plaintiff's said term of work ended on the 31st day of December, 1876, and the aforesaid balance due him became and was due and payable on the first day of January, 1877, and that the defendant, though requested, neglects and refuses to pay the same. That on the 12th day of January, 1877, the plaintiff filed for record in the office of the county recorder of Salt Lake County, Territory of Utah, a notice that he had, and intended to hold, a lien on said Flagstaff mine for the payment of said sum of sixteen hundred dollars, of which notice the following is a copy, to wit:

TERRITORY OF UTAH,
Salt Lake County, ss :

Notice is hereby given that the undersigned, George Cullins, has and intends to hold a lien upon that certain mine situate in Little Cottonwood Cañon and mining district, Salt Lake County, Utah Territory, located and known as the Flagstaff mine, with its dips, angles, spurs, and variations, and the ore therein, with its appurtenances, which said mine is, and for a long time past has been, owned by the Flagstaff Silver Mining Company of Utah, limited, as security for the payment of sixteen hundred dollars, in pursuance of an act of the governor and legislative assembly of Utah, entitled "An act to provide rules for the working and development of mines," approved February 16th, 1872. That the claim for which this lien is held is for work and labor upon said mine, done and performed by the undersigned, in pursuance of a contract made with the owners of said mine through their authorized agent or superintendent, which said work and labor has been performed in said mine, as superintendent of the same, from January 1st, 1876, to January 1st, 1877, and for which work the owners of the mines agreed to pay the sum of thirty-six hundred dollars per year, the balance of \$1,600 being due and unpaid.

Dated January 11, 1877.

GEO. CULLINS. [SEAL.]

Witness: ROBERT HARKNESS.

And the plaintiff further alleges on information and belief, that on and from the 1st day of December, 1876, to and including the 23d day of December, 1876, the defendant, the Flagstaff Silver Mining Company of Utah, had in its employment and at work in and upon said Flagstaff mine a large number of laborers whose pay for labor done during said time became and was due on the 1st day of January, 1877. That on or about the 23d day of December, 1876, the defendant, Andrew G. Hunter, as the agent, manager in Utah, and attorney in fact of the defendant, the Flagstaff Silver Mining Company, of Utah, took possession and assumed the management of said mine, and of all the last named defendants' business and property in Utah, and still has the possession and management thereof. That the men employed in said mine during said 23d day of the month of December, 1876, as aforesaid, were not paid on the pay-roll of said mine for said month, as had been theretofore customary, but that the defendant, Andrew G. Hunter, made arrangements with said men, by which they were to file miners' liens upon said mine in the county recorder's office of Salt Lake County, to secure the amounts severally due them, and assign said liens to said defendant, Andrew G. Hunter; that in pursuance of said plan, and in the month of January, 1877, a large number of said men did make out and file or cause to be filed in said office notices of miners' liens for the payment

of the sums due them severally, the said defendant Andrew G. Hunter procuring said liens to be drawn, and furnishing all the facilities for making, executing and filing the same, and afterwards, as plaintiff is informed and believes, the said liens were severally assigned to the said Andrew G. Hunter, who now holds the same to a large amount, and sets up and claims to own the same, and that they are each and all valid and subsisting liens on said mine, and entitled to payment equally and pro rata with other miners' demands secured by liens.

The plaintiff therefore prays judgment that there is due to him from the defendant, The Flagstaff Silver Mining Company of Utah, limited, the sum of sixteen hundred dollars and interest thereon at ten per cent.

per annum, from January 1st, 1877, and that he have and recover the same of and from said defendant; also that said sum and interest be adjudged a lien on said mine from and after the 14th day of December, 1873, and a lien prior and superior to any lien for work on said mine, done under contract made since the 14th day of December, 1873, and prior and superior to any pretended liens held by the defendant Hunter; that the pretended liens assigned to the defendant Hunter be adjudged fraudulent and invalid as against plaintiff's demand and lien; that the validity, amount, and priority of all liens held by lien holders, and who may choose to come in and be made parties, may be adjudged, and that said mine, with its surface ground, improvements, fixtures, and all appurtenances may be sold, and the proceeds of the sale applied to the payment and discharge of plaintiff's lien, with interests and costs of suit, and of such other valid liens as may be shown, in the order of their priority, and that the plaintiff have such other and further judgment and relief as may be proper and equitable, with costs of suit.

Dated January 25th, 1877.

BENNETT & HARKNESS,
Plff's Att'ys.

9 TERRITORY OF UTAH,
Salt Lake County, ss :

George Cullins, being duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has heard his foregoing complaint read, and knows the contents thereof; and that said complaint is true of his own knowledge, except as to the matters which are therein stated to be on information and belief, and as to those matters, he believes it to be true.

GEO. CULLINS.

Subscribed and sworn to before me, Jan'y 31st, 1877.

C. S. HILL, *Clerk.*

(Indorsed :) 3d dist. court, Utah. George Cullins vs. Flagstaff Silver M. Co., of Utah, limited, and A. G. Hunter. Complaint. Filed Jan'y 31st, 1877. C. S. Hill, clerk. Bennett & Harkness, plff's att'ys.

10 *Answer of Flagstaff Co.*

In the district court of the third judicial district, Territory of Utah and county of Salt Lake.

GEORGE CULLINS, PLAINTIFF,

vs.

FLAGSTAFF SILVER MINING COMPANY OF
Utah, limited, and Andrew G. Hunter, de-
fendants.

The defendant the Flagstaff Silver Mining Company of Utah, lim-

ited, for its separate answer to plaintiff's complaint herein, denies that the plaintiff did work on defendants' Flagstaff mine, as a miner in superintending or directing the working thereof or otherwise, from the 15th day of December, A. D. 1873, until the 31st day of December, A. D. 1876, continuously or otherwise, than as hereinafter stated, or that plaintiff did perform thirty-six and $\frac{1}{2}$ month's labor upon said mine, or any other time than as hereinafter stated, or that the defendant became indebted to the plaintiff on account of said alleged work in the sum of ten thousand nine hundred and fifty (10,950) dollars; that there is still due or unpaid plaintiff, on account of said work or otherwise, the sum of sixteen hundred (1,600) dollars, or other sum than as herein-
 11 after stated; that plaintiff's time of work ended on the 31st day of December, 1876, or that said alleged balance of \$1,600 became due on the first day of January, A. D. 1877.

The defendant said company, for its further separate answer, says: The plaintiff entered into the employment of defendant about the month of December, A. D. 1873, and was discharged therefrom on the 23d day of December, 1876, & that after said last date, plaintiff performed no work or service whatever for defendant. Upon information and belief defendant says that during the time from December, 1873, until the said 23d day of December, 1876, the plaintiff was absent from the service of this defendant and was engaged on his own private business for the space of three months, and that the total time plaintiff was in the service and employ of this defendant was thirty-three and $\frac{1}{4}$ (33 $\frac{1}{4}$) months, which at the agreed price amounted to the total sum of nine thousand nine hundred and seventy-five (9,975) dollars; that plaintiff has already been paid thereon the sum of nine thousand nine hundred and forty dollars, leaving a balance of thirty-five dollars due the
 12 plaintiff, which defendant has heretofore offered to pay, but plaintiff refused to accept the same, and defendant still is ready and willing to pay said balance.

Defendant, for its further separate answer says, plaintiff during his said employment for this defendant did not perform any work or labor as a miner upon defendants' said Flagstaff mine, in said Salt Lake County; that his said employment consisted in superintending and watching over the workmen and laborers employed in working defendants' said mine, in the shipping of defendants' ore produced from said mine, and generally in managing and directing the business of this defendant, at Alta City; & in buying at Salt Lake City, in said county, defendants' mining supplies; and that for such service the plaintiff is not entitled to a miner's or other lien upon defendants' said mine or other property.

Wherefore defendant asks to be dismissed this action with its costs and other proper relief.

ROBERTSON & McBRIDE,

Att'ys for Def'ts, The Flagstaff S. M. Co., &c.

13 TERRITORY OF UTAH,
County of Salt Lake, ss:

Andrew G. Hunter, being first duly sworn, deposes and says: He is the manager and attorney in fact of the business in this Territory of the defendant the Flagstaff Silver Mining Company of Utah, limited, a foreign corporation; that he has read the foregoing answer, and knows the contents thereof, and says the same is true of his own knowledge, except these matters therein stated on information & belief, & those he believes to be true.

A. G. HUNTER.

Subscribed and sworn to before me, the 22d day of February, A. D. 1877.

[SEAL.]

SAMUEL E. MAY,

Notary Public.

(Indorsed:)

In 3d dist. court. Geo. Cullins vs. Flagstaff S. M. Co., &c. Answer.

Rec'd copy of within, the 22d day of Febr'y, 1877.

BENNETT & HARKNESS,

Plff's Att'ys.

Filed Feb'y 22, 1877.

C. S. HILL, *Clerk.*

14

Findings.

District court, third judicial district.

TERRITORY OF UTAH,

Salt Lake County :

GEORGE CULLINS, PLAINTIFF,

vs.

FLAGSTAFF SILVER MINING COMPANY OF

Utah (limited) and Andrew G. Hunter, de-
fendants.

This action being brought by the plaintiff to enforce a miner's lien against the defendant, The Flagstaff Silver Mining Company (limited), and to have certain alleged miners' liens held by the defendant, Andrew G. Hunter, adjudged invalid as against the plaintiff, and said action having been brought to trial before the court at the April term thereof, to wit, on the 12th and 13th days of July, 1877, and the evidence and arguments of counsel having been duly considered, the following facts are found by the court, to wit :

That the defendant, The Flagstaff Silver Mining Company of Utah (limited), and hereinafter called "said company," on the 14th of December, 1873, was, and ever since has been, a corporation organized under the laws of the Kingdom of Great Britain; and during all
15 said time has owned, and until and including the 23d day of December, 1876, worked a certain mine called the Flagstaff, situate in Little Cottonwood mining district, Salt Lake County, Utah.

2d. That from the 14th day of December, 1873, and to and including the 23d day of Dec., 1876, one J. N. H. Patrick was the general agent and manager of the mining and smelting business of said company in America, & had full power to make and carry out all contracts in said company's business.

3d. That on or about the 14th day of December, 1873, the said company, by said J. N. H. Patrick, its agent for that purpose, duly authorized, employed the plaintiff, for an indefinite time thereafter, to direct the work in its said mine, and with authority to employ and discharge miners, and procure and purchase supplies for working said mine, and that it was the duty of the plaintiff, by virtue of said employment, to plan, oversee, and direct the work in said mine, direct the shipping of ore, and generally to control and direct the actual working and development of the

mine; that the plaintiff, while in the employment of said company, performed said duties, and in the performance thereof did some manual labor; that by the terms of said employment the plaintiff was to have three hundred dollars per month, and by a modification of said contract soon thereafter made with said company, acting by said agent, the plaintiff was also permitted to also superintend the working of a mine called the Last Chance, without any abatement of pay from said company.

4th. That the plaintiff worked for the said company, under said employment, from the 15th day of December, 1873, to and including the 23d day of December, 1876, and that the amount of wages earned during said time is ten thousand eight hundred and seventy dollars.

5th. That said company, from time to time, made payments to the plaintiff on account of said work, all said payments amounting to the sum of nine thousand three hundred dollars.

6th. That at the commencement of the action there was, and still is, due from said company to the plaintiff the sum of fifteen hundred and thirty dollars, and interest thereon at ten per cent. from Jan'y 1st, 1877, on which day all of said money was due, no part of which has been paid.

7th. That on the 12th day of January, 1877, the plaintiff filed for record, and had recorded in the office of the county recorder of Salt Lake County, Utah, a notice in due form that he had, and intended to hold, a lien on said Flagstaff mine for the amount due him for said labor, as alleged in the complaint herein, which notice was filed within less than ninety days from the completion of said labor, and this action was commenced within less than one year after the completion of said labor.

7th. That laborers in the Flagstaff mine who worked therein, including and between the 1st and 23d days of December, 1876, and whose names and the amount due each are stated in the answer of the defendant, Andrew G. Hunter, on or about the 8th day of January, 1877, severally filed in the office of the county recorder of said county of Salt Lake, notices that they intended to hold a lien on said Flagstaff mine for the amount due for such labor, the said liens in the aggregate amounting to six thousand nine hundred and fifteen & $\frac{24}{100}$ dollars, and on the 20th day of January, 1877, the said defendant, Andrew G. Hunter, purchased said liens, and paid therefor the sum of five thousand and seventy-four & $\frac{24}{100}$ dollars.

8th. That John Cunningham and Alexander Rogers, on the 5th day of February, 1877, filed in said recorder's office a notice of a lien on said Flagstaff mine for the payment of the sum of five hundred and ninety-eight & $\frac{77}{100}$ dollars due for materials sold said company for use and used in operating said mine, which debt was contracted from the 6th to the 26th day of December, 1876, and on the 7th day of February, 1877, adjudged said lien to the defendant, Andrew G. Hunter.

9th. That on the 23d day of December, 1876, the defendant, Andrew G. Hunter, took possession of said Flagstaff mine as the general agent and manager of said company in Utah, and then held from said company full power of attorney to act in all its business and an appointment to act as manager thereof, and has ever since acted as the attorney in fact and general manager in all the business of the said company in Utah, and has also worked said mine as lessee thereof under lease from said company.

10th. That the laborers in said mine who filed their said liens for work from the 1st to the 23d day of December, 1876, as aforesaid, did so under a promise from said defendant, Hunter, that he would buy

said liens. After they were filed, and at the time of said promise, and at the time the same, & also said lien of Cunningham & Rogers were purchased by said Hunter, he was attorney in fact, and managing agent of said company as aforesaid, and was also operating said mine as lessee by lease from said company. Then all of said liens were filed.

And as conclusions of law the court finds: That the plaintiff is entitled to judgment for the sum of fifteen hundred and thirty dollars, and interest at ten per cent. per annum, from and after Jan'y 1st, 1877, and adjudging the same a lien on all the interest, right and property of said company in such mine, on the 1st day of August, 1876, and for

20 a sale of all the interest, right and property of said company in said mine, at that date, to satisfy said sum and interest and costs of suit, and for execution against said company for any deficiency after such sale, and judgment accordingly is ordered.

And as a further conclusion of law the court finds that the defendant, Andrew G. Hunter, is not entitled to enforce the liens, as miners' liens, against said mine, set up by him by way of counter claim in his answer, and that by reason of his relation to said defendant company at the time said liens were filed and acquired by him, and the manner the same were acquired, he is not entitled thereon to the remedy provided by law, by sec. 1221 of the revised laws of Utah, in regard to miners' liens, and his said counter-claims should be dismissed without prejudice to any other form of action thereon against said company, and judgement accordingly is ordered.

Dated July 13th, 1877.

By the court.

M. SCHAEFFER, *Judge.*

(Indorsed:) 3d dist. court, Utah. George Cullins vs. Flagstaff S. M. Co. of Utah (limited), & Andrew G. Hunter. Findings. Filed July 20th, 1877. C. S. Hill, clerk, by H. G. McMillan, deputy clerk. Bennett & Harkness, pl't's att'ys.

21 At a district court of the third judicial district of the Territory of Utah, county of Salt Lake, held at the court-house in the city and county of Salt Lake on the 20th day of July, A. D. 1877.

Present, the Hon. M. Schaeffer, judge of the third judicial district.

GEORGE CULLINS, PLAINTIFF,

vs.

FLAGSTAFF SILVER MINING COMPANY OF
Utah (limited) and Andrew G. Hunter, de-
fendant.

This action having been tried before the court sitting without a jury, by consent of the parties herein, at the April term, A. D. 1877, on the 12th & 13th days of July, 1877: Now the court, being in all things herein fully advised and filed its findings of facts and the conclusions of law based thereupon and in accordance therewith, orders that judgement be entered herein in favor of George Cullins and against the Flagstaff Silver Mining Company of Utah (limited), for the sum of sixteen hundred and twelve dollars, together with plaintiff's costs herein, taxed as \$41⁸⁸/₁₀₀, which judgement is entered in judgement book D, folios 138-9.

District court. Third judicial district.

TERRITORY OF UTAH,
Salt Lake County :

GEORGE CULLINS, PLAINTIFF,

vs.

FLAGSTAFF SILVER MINING COMPANY OF
Utah (limited) and Andrew G. Hunter, de-
fendants. }

This action having been tried by the court at the April term, 1877, to wit, on the 12th and 13th days of July, 1877, and the court having made and filed findings of fact and conclusions of law, by which it is, among other things, found that the plaintiff is entitled to judgement for the sum of fifteen hundred and thirty dollars and interest thereon at ten per cent. per annum, from and after January 1st, 1877, and adjudging the same a lien on all the interest, right and property of the defendant company in the Flagstaff Mine on the 1st day of August, 1876, and for a sale of all the interest, right and property of said company in said mine at that date, to satisfy said sum and interest and costs of suit, and for execution against said company for any deficiency after such sale; also that said defendant, Andrew G. Hunter, is not entitled to enforce

the liens as miners' liens against said mine, set up by him by way of
23 counter claim in his answer, and that his counter claim should be dismissed without prejudice to any other form of action thereon against said defendant company, and judgement in accordance with the findings in said action having been ordered:

Now, on motion of Bennett & Harkness, attorneys for the plaintiff, it is considered and adjudged by the court that the plaintiff, George Cullins, have and recover of and from the defendant the Flagstaff Silver Mining Company of Utah (limited), the sum of sixteen hundred and twelve (1,612) dollars, being the amount found due, and interest, as aforesaid; also the further sum of forty-one and $\frac{85}{100}$ dollars, the plaintiff's costs herein, hereby adjudged to the plaintiff, making in all the sum of sixteen hundred and fifty-three and $\frac{85}{100}$ dollars; that said judgement be, and the same is hereby, declared a lien on all the interest, right, and property of the Flagstaff Silver Mining Company of Utah (limited), on the 1st day of August, 1876, in that certain mine and mining claim, situate in Little Cottonwood mining district, Salt Lake County, Utah, and located, recorded, and known as the Flagstaff Mine, with the fixtures, surface ground, and appurtenances; that all the interest, right, and

property of said company in said mine, mining claim, and appur-
24 tenances on the 1st day of August, 1876, be sold, and the proceeds applied to pay said judgement, and the interest and costs accruing thereon; and that the plaintiff have execution against said company for any deficiency after applying the proceeds of said sale; and it is further ordered and adjudged that the counter claims set up in the answer of the defendant Andrew G. Hunter be, and the same are hereby, dismissed, without prejudice to the right of said Hunter to bring any other form of action on said counter claims, or any or either of them.

Dated July 13th, 1877.

By the court.

M. SCHAEFFER, Judge.

(Indorsed :) 3d dist. court Utah. George Cullins vs. Flagstaff Silver Mining Company of Utah (limited) and Andrew G. Hunter. Judgement. Filed July 20th, 1877. U. S. Hill, clerk, by H. G. McMillan, deputy clerk. Bennett & Harkness, pl'ff's atty's.

25

Notice of appeal.

In the district court. Third judicial district.

TERRITORY OF UTAH,
County of Salt Lake :

GEORGE CULLINS, PLAINTIFF,
vs.
FLAGSTAFF SILVER MINING COMPANY OF
Utah (limited) and Andrew G. Hunter, de-
fendants. }

Please take notice that the defendant, Flagstaff Silver Mining Company of Utah (limited), in above entitled action, does hereby appeal to the supreme court of said Territory from the findings of conclusions of law, and the judgement made and entered on the 13th day of July, A. D. 1877, by the said district court in favor of the plaintiff in said action, and against the said defendant, said company, and from the whole thereof.

Salt Lake City, August 9th, 1877.

ROBERTSON & McBRIDE,
ROSEBOROUGH & MERRITT,
Attys for Def't.

To the clerk of said district court, & Bennett & Harkness, att'ys for pl'ff.

(Indorsed :) In 3d dist. court of Utah T'y. Geo. Cullins, pl'ff, vs. Flagstaff S. M. Co. et al., defts. Notice of appeal.

Copy of within this 16th day of August, 1877, received by us after filing of this with clerk.

BENNETT & HARKNESS,
Pl'ff's Att'ys.

Filed Aug. 16th, 1877.

C. S. HILL, *Clerk,*
By H. G. McMILLAN,
Deputy Clerk.

26

Statement and exceptions.

In the district court, third judicial district, Territory of Utah and county of Salt Lake.

GEORGE CULLINS, PLAINTIFF,
vs.
FLAGSTAFF SILVER MINING COMPANY OF
Utah (limited) and Andrew G. Hunter, de-
fendants. }

This action was brought by plaintiff to recover of defendant, Flag-

staff Silver Mining Company of Utah (limited), the value of plaintiff's services as the mining superintendent of said company, and claiming a miner's lien for said services upon the Flagstaff Mine, the property of said company; also, to have certain miners' liens claimed by said defendant Hunter, adjudged void as against plaintiff; that on the 12th & 13th days of July, 1877, said action was brought to trial before said court at the April term, 1877, thereof, and without a jury; at which all the parties hereto, by themselves and their counsel, were present, & after the production of the evidence and argument of counsel, the court, after due consideration of same, did, on the said 13th day of July, 1877, report its findings of fact and conclusions of law and its judgement based thereon, to each and all of which the defendant, 27 said company, by its counsel, duly excepted, and the exceptions were allowed by the court; and defendant, said company, now assigns as error—

1st. That the said findings of said court were erroneous in that it found as a conclusion of law that said plaintiff was entitled to a lien for the amount of his services on the Flagstaff mine, the property of said company.

2d. That said court erred in finding in this proceeding any amount whatever due plaintiff.

3d. The court in rendering said judgement erred—

First. In finding any judgement for any sum whatever against said defendant company, and

Second. In adjudging against the property of defendant a lien in favor of plaintiff for said sum so found due him, and in ordering & adjudging that the said Flagstaff mine be sold to satisfy said debt, and that all of said judgement, so far as the same applies to or affects the said defendant company, is erroneous.

ROBERTSON & MCBRIDE, &
ROSEBOROUGH & MERRITT,

Att'ys for Def't.

(Indorsed :) In 3d dist. court of Utah T'y. Geo. Cullins, pl'ff, vs. Flagstaff S. M. Co. et al., def'ts. Statement.

Rec'd copy of within this 16th day of August, 1877.

BENNETT & HARKNESS,

Plff's Att'ys.

Filed Aug. 16th, 1877.

C. S. HILL, *Clerk,*
By H. G. McMILLAN,
Deputy Clerk.

In district court, third judicial district.

TERRITORY OF UTAH,
County of Salt Lake:

GEORGE CULLINS, PLAINTIFF,

vs.

FLAGSTAFF SILVER MINING COMPANY OF
Utah (limited), defendant.

Whereas the said defendant in the above entitled action is about to

appeal to the supreme court of said Territory from the order of said district court rendering judgement against defendant in favor of the plaintiff in said action, on the 13th day of July, A. D. 1877, for the sum of \$1,612.00 damages and \$41⁸⁵/₁₀₀, costs of suit:

Now, therefore, in consideration of the premises & of such appeal, we, the undersigned, George M. Scott, a merchant, and A. Eilers, mining engineer, residents of said Salt Lake County, do hereby jointly and severally undertake and promise on the part of appellant that appellant will pay all damages & costs which may be awarded against appellants on the appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

29 And whereas said appellant is desirous of staying the execution of said judgement so appealed from, we do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of thirty three hundred seven & ⁷⁰/₁₀₀ (3,307⁷⁰/₁₀₀) dollars, being double the amount of said judgement & costs, that if said judgement appealed from, on any part thereof, be affirmed, the appellant will pay to said plaintiff the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against appellant upon appeal.

Witness our hands and seals the 23d day of August, A. D. 1877.

GEO. M. SCOTT. [SEAL.]
A. EILERS. [SEAL.]

TERRITORY OF UTAH.

County of Salt Lake, ss :

The undersigned persons named in and who signed the foregoing undertaking as sureties thereto, being each first duly sworn, each for himself and not one for the other deposes and says he is a resident of said county, and is worth the amount specified in said undertaking, over and above all their just debts and liabilities exclusive of property exempt from execution.

GEO. M. SCOTT.
A. EILERS.

Subscribed and sworn to before me this 24th day of August, A. D. 1877.

[SEAL.]

SAMUEL E. MAY,
Notary Public.

TERRITORY OF UTAH.

County of Salt Lake, ss :

I, C. S. Hill, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original complaint, answer of Flagstaff Co., findings, order of court, judgement, notice of appeal, statement & exceptions, and undertaking on appeal, in the above entitled action filed in my office.

Witness my hand and the seal of said court at Salt Lake City, this 5th day of Dec., A. D. 1877.

[SEAL.]

C. S. HILL, Clerk,
By B. P. HILL,
Deputy Clerk.

(Indorsed :) In 3d. dist. court, Utah, Geo. Cullins vs. Flagstaff S. M. Co. Undertaking. Filed Aug. 25, 1877. C. S. Hill, clerk, by H. G. McMillan, deputy clerk.

12 FLAGSTAFF SILVER MINING CO. ET AL. VS. CULLINS.

31 In district court, third judicial district.

TERRITORY OF UTAH,
County of Salt Lake.

GEORGE CULLINS, PLAINTIFF,
vs.
FLAGSTAFF SILVER MINING COMPANY OF UTAH,
(limited) et al., def'ts. }

It is ordered that in this case on appeal the defendant appealing may have printed the abstract of statement on appeal, and shall not be required to print the statement.

M. SCHAEFFER, Judge.

32 In the district court, third judicial district.

TERRITORY OF UTAH.
County of Salt Lake.

GEORGE CULLINS, PL'FF,
vs.
FLAGSTAFF SILVER MINING COMPANY OF UTAH,
(limited) et al., def'ts. }

It is hereby stipulated that the foregoing is correct, and shall constitute, without further certificate or identification, the transcript on appeal to the supreme court of said Territory. Also it is stipulated that an undertaking on appeal was filed in time in this case; that to the same objection was made as insufficient; that then the undertaking copied in foregoing transcript was filed, which it is stipulated is in all respects sufficient in this case.

Dec., 8, 1877.

BENNETT & HARKNESS,
Att'ys for Pl'ff.
ROBERTSON & McBRIDE, &
ROSBOROUGH & MERRITT,
Att'ys for Def'ts.

(Indorsed :) Geo. Cullins vs. Flagstaff S. M. Co. et al. Transcript. Filed Dec. 10th, 1877, in my office. E. T. Sprague, clerk sup. court.

33 And afterwards, at a term of said supreme court of Utah Territory, began and held at Salt Lake City, in said Territory, on the 14th day of January, A. D. 1878, proceedings were had in said cause and entered on the records of said court as follows, to wit:

TUESDAY, January 22d, A. D. 1878.

A session of the supreme court of the Territory of Utah was held this day, beginning at 10 o'clock a. m.

Present, all the justices, the clerk, marshal, and members of the bar.

The court was duly opened and record of last session read and signed.

From 3d dist.

GEORGE CULLINS, RESPONDENT,
vs.
 FLAGSTAFF SILVER MINING COMPANY OF UTAH,
 (limited) impleaded, &c. }

This cause coming on regularly for hearing, was argued by J. H. Beatty, esq., for appellant, C. W. Bennett, esq., for respondent, submitted and taken under advisement by the court.

34

MONDAY, February 11th, A. D. 1878.

From 3d dist.

* * * * *

GEORGE CULLINS, RESPONDENT,
vs.
 FLAGSTAFF SILVER MINING COMPANY OF UTAH,
 (limited) impleaded, &c., appellant. }

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereupon, it is now here ordered and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed with costs.

35 And afterwards, on the 12th day of March, A. D. 1878, was is sued and filed in the office of the clerk of said supreme court of Utah Territory a writ of error and a copy thereof, the original of which follows, to wit:

36

Writ of error.

In the Supreme Court of the United States of America.

FLAGSTAFF SILVER MINING COMPANY OF
 Utah (limited), Andrew and G. Hunter, plaint-
 iffs in error. }

vs.
 GEORGE CULLINS, DEFENDANT IN ERROR. }

UNITED STATES OF AMERICA, *ss* :

The President of the United States to the honorable the judges of the supreme court of the Territory of Utah, greeting :

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, the judges thereof, between George Cullins, plaintiff, and the Flagstaff Silver Mining Company of Utah (limited), and Andrew G. Hunter, defendants, a manifest error hath happened, to the great damage of the defendants, as by their answer appears: We, being willing that

37 error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with

all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, chief justice of the said Supreme Court, the 12th day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.]

E. T. SPRAGUE,

Clerk of Supreme Court of Utah Territory.

(Indorsed :) In the Supreme Court of the United States of America. The Flagstaff Silver Mining Company of Utah (limited), and Andrew G. Hunter, plaintiffs in error, vs. George Cullins, defendant in error. Writ of error. Filed March 12th, A. D. 1878. E. T. Sprague, clerk sup. court.

38 And afterwards, on the 13th day of March, A. D. 1878, was filed in said clerk's office of said supreme court of said Territory a citation, which, with proof of service thereof endorsed thereon, follows, to wit:

39

Citation.

In the Supreme Court of the United States of America.

FLAGSTAFF SILVER MINING COMPANY OF UTAH (limited), and Andrew G. Hunter, plaintiffs in error,	}
<i>vs.</i>	
GEORGE CULLINS, DEFENDANT IN ERROR.	}

The United States of America, greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Utah, wherein the Flagstaff Silver Mining Company of Utah (limited) and Andrew G. Hunter are plaintiffs in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiffs
40 in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

To George Cullins, defendant in error, and to Bennett and Harkness, his attorneys.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 12th day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

MICHAEL SCHAEFFER,

Chief Justice Supreme Court Utah Territory.

TERRITORY OF UTAH,

County of Salt Lake, ss :

41 On this 13th day of March, 1878, personally appeared before me, Ezra T. Sprague, clerk of the supreme court of the Territory of

Utah, James H. Beatty, and makes oath that he delivered a true copy of the within citation to C. W. Bennett, one of the attorneys for George Cullins, the within named defendant in error, on the 13th day of March, 1878.

JAS. H. BEATTY.

Subscribed and sworn to. before me this 13th day of March, A. D. 1878.

[SEAL.]

E. T. SPRAGUE.

Clerk of Supreme Court of Utah Territory.

42 (Indorsed:) In the Supreme Court of the United States of America. The Flagstaff Silver Mining Company of Utah (limited) et al., plaintiffs in error, vs. George Cullins, defendant in error. Citation.

Service of the within citation made and admitted this 13th day of March, 1878.

BENNETT & HARKNESS,
Plffs' Atty's.

Filed March 13, 1878.

E. T. SPRAGUE,
Clerk.

43 In the supreme court of the Territory of Utah.

GEORGE CULLINS, PLAINTIFF & RESPONDENT, }
vs.
FLAGSTAFF SILVER MINING COMPANY OF }
Utah (limited), defendant & appellant, and }
Andrew G. Hunter, defendant. }

To the honorable Michael Schaffer, chief justice of the supreme court of the Territory of Utah:

Your petitioner, the Flagstaff Silver Mining Company of Utah (limited), one of the above named defendants and the appellant, would respectfully show to your honor, that on the 14th day of January, 1878, the above entitled action was tried in said court upon an appeal from the district court of the 3d judicial district of said Territory, and on the 11th day of February judgment was made and rendered in said supreme court in said cause against your petitioner and in favor of said George Cullins, plaintiff & respondent, to the great damage of your petitioner. And your petitioner, believing that error hath been committed, and being desirous that the said action may be reviewed in the Supreme

44 Court of the United States, in order that error, if any, may be corrected and speedy justice be done the parties herein in that behalf, most respectfully asks your honor that an appeal be allowed from said judgment to the said Supreme Court of the United States; and your petitioner further states that the amount in controversy in this said action exceeds the sum of one thousand dollars.

FLAGSTAFF SILVER MINING COMPANY OF UTAH (LIMITED),
Defendant and Appellant,
By JAS. H. BEATTY,
Its Attorney in Fact.

TERRITORY OF UTAH,

County of Salt Lake, ss :

Upon reading & filing the above petition and good cause appearing therefor, it is hereby ordered that the appeal herein prayed for be and the same is hereby allowed.

Done at Salt Lake City this 12th day of March, A. D. 1878.

MICHAEL SCHAEFFER,

Chief Justice of Supreme Court, Utah Territory.

(Indorsed): Supreme court of Utah Territory. George Cullins, pl'ff & appellant, vs. Flagstaff Silver Mining Company of Utah (limited), def't & appellant, & Andrew G. Hunter, def't. Petition for appeal. Filed March 12, 1878. E. T. Sprague, clerk sup. court.

45 And afterwards, on the 19th day of March, A. D. 1878, was filed in the office of the clerk of said Supreme Court of Utah Territory the opinion of said court in said cause, of which the following is a copy, and of the indorsements thereon.

46 Supreme court. January term, 1878.

TERRITORY OF UTAH :

GEORGE CULLINS, RESPONDENT,

vs.

FLAGSTAFF SILVER MINING COMPANY (LIMITED)
and Andrew G. Hunter, appellants.

.. Appeal from the third district court.

This action was brought to enforce a miner's lien against the defendant corporation, and the only question in the case is whether the respondent, being superintendent or foreman of the defendant's mine, is he, in the sense of the mechanic's and miner's lien law of this Territory, a laborer, so as to entitle him to a lien on the mine.

Section 1221 of the compiled laws provides that "any person or persons who shall perform any work or labor upon any mine, or furnish any materials therefor, in pursuance of any contract made with the owner or owners of such mine, or of any interest therein, shall be entitled to a miner's lien for the payment thereof, upon all the interest, right, and property in such mine by the person or persons contracting for such

labor or materials at the time of making such contract; said lien
47 may be enforced in the same manner and with the same effect as a mechanic's lien, as provided by the laws of Utah." It is upon the construction to be given to this language that the court is called upon to pass.

The court below found that the plaintiff was employed by the defendant corporation "to direct the work in its said mine, with authority to employ and discharge miners, and procure and purchase supplies for working said mine, and that it was the duty of the plaintiff, by virtue of said employment, to plan, oversee, and direct the work in said mine, direct the shipping of ore, and generally to control and direct the actual working and development of the mine;" and that the notice of intention to hold a lien upon the mine was regular and sufficient.

It is claimed that, as the law giving liens must be strictly construed, the plaintiff, by virtue of his employment, does not come within the

description of those who are entitled to the benefit of the act. From the nature of the plaintiff's employment, and the relation in which he stood to the other laborers, it is clear that his employment was in view of his especial ability and fitness to direct the work on the mine. It was such as a skilled laborer only would be employed to perform.

The legislative intent in giving the lien was not, as was claimed by the appellants, for the poorer class of laborers alone, but was for the benefit of all those who could bring themselves within its purview, and from the nature of this employment receive the benefits it confers, without regard to their pecuniary condition. We have no doubt that the plaintiff's claim comes within the very letter of the law, as well as within its spirit. He was as much an employee of the appellants as any laborer on the mine, and, if at all competent for the position assigned him by his employers, contributed more than any other one to the development of the property. (Capron vs. Strout, 11 Nev., 310.)

The case of Smallhouse vs. Kentucky & M. G. & S. M. Co., 2d Montana, 443, cited by appellants, is not analogous to the case under consideration. It seems that the person seeking to enforce a lien in the case referred to was the general manager of the corporation in all its business at the place where it was carried on, and, as was stated in the opinion, he was not an architect or laborer, and did not labor directly in the construction of the buildings, etc., "but rather that he was employed by the corporation, at a fixed salary, to manage and superintend its affairs at the place named."

In the case at bar it was the plaintiff's duty, among other things, to direct the works in the mine, and, according to the findings, he "performed said duties, and in the performance thereof did some manual labor." Even if the latter clause had not been in the findings, yet the facts as found make him such a laborer upon the mine as to entitle him to the benefit of the act.

The judgement of the lower court is affirmed.

PHILIP H. EMERSON,
Asso. Justice.

(Indorsed :) Utah Territory supreme court. George Cullins, respondent, vs. The Flagstaff Silver Mining Company (limited) and Andrew G. Hunter, appellants. Opinion of court. Filed March 19th, A. D. 1878. E. T. Sprague, clerk sup. court.

And afterwards, on the 23d day of March, A. D. 1878, was filed in the office of said clerk of said supreme court of Utah Territory a bond for costs, together with a supersedeas bond in said cause, of each which bonds and the endorsements thereon the following is a copy, to wit:

Bond for costs.

In the Supreme Court of the United States of America.

THE FLAGSTAFF SILVER MINING COMPANY OF
Utah (limited) & Andrew G. Hunter, plaintiffs in error,

vs.

GEORGE CULLINS, DEFENDANT IN ERROR.

Know all men by these presents that we, of the city and county of Salt Lake, and Territory of Utah, are held and firmly bound unto D. W. Middleton, clerk of the Supreme Court of the United States, in the full and just sum of two hundred dollars, current

money of the United States, to be paid to the said D. W. Middleton, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, or assigns, jointly and severally, by these presents, sealed with our seals and dated this 12th day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas, lately, at a supreme court of the Territory of Utah, holden at Salt Lake City in said Territory, between George Cullins, 52 plaintiff, and The Flagstaff Silver Mining Company of Utah (limited) and Andrew G. Hunter, defendants, judgement was rendered against said defendants; and the said defendants having obtained a writ of error to remove the said cause to the Supreme Court of the United States, and filed a transcript of the record of said court in said cause in the office of the clerk of the Supreme Court of the United States to reverse the judgement in the aforesaid suit:

Now, the condition of the above obligation is such that if the said obligors shall well and truly pay, or cause to be paid, to the said D. W. Middleton, his heirs, executors, administrators, or assigns, all such fees as shall accrue to him, the said D. W. Middleton, clerk as aforesaid, and charged to said defendants, in the prosecution of the said appeal, then the above obligation to be void; otherwise to remain in full force and virtue.

G. W. BILLING. [SEAL.]
A. HAVANER. [SEAL.]
F. W. BILLING. [SEAL.]

Sealed and delivered in presence of—
JAS. H. BEATTY.

53 I, Michael Schaeffer, chief justice of the supreme court of the Territory of Utah, do hereby certify that the within named obligors are known to me to be perfectly good and responsible for the within named amount.

MICHAEL SCHAEFFER,
Chief Justice Supreme Court, Utah Territory.

(Indorsed :) In the Supreme Court of the United States of America. Flagstaff Silver Mining Company of Utah (limited) et al., plaintiffs in error, vs. George Cullins, defendant in error. Bond for costs. Filed March 23d, A. D. 1878. E. T. Sprague, clerk sup. c't.

54 *Security in error.*

In the Supreme Court of the United States of America.

THE FLAGSTAFF SILVER MINING COMPANY OF
Utah (limited) and Andrew G. Hunter, plaintiffs in error,

vs.

GEORGE CULLINS, DEFENDANT IN ERROR.

Know all men by these presents that we, and are held and firmly bound unto George Cullins, the above named defendant in error, in the full and just sum of twenty-five hundred dollars, to be paid to the said George Cullins, defendant in error, as aforesaid, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, or assigns, jointly and severally, by these presents. Sealed with our seals and dated this 12th day of March,

in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas, lately, at a supreme court of the Territory of Utah, hold-
 en at Salt Lake City, in said Territory, in a suit depending
 55 in said court between George Cullins, plaintiff, and The Flagstaff
 Silver Mining Company of Utah (limited) and Andrew G. Hunt-
 er, defendants, judgement was rendered against the said Flagstaff Sil-
 ver Mining Company of Utah (limited) and Andrew G. Hunter, defend-
 ants; and the said defendants, as aforesaid, having obtained a writ of
 error, and filed a copy thereof in the clerk's office of the said court, to
 reverse the judgement in the aforesaid suit, and a citation directed to the
 said George Cullins, plaintiff aforesaid, citing and admonishing him to
 be and appear at a Supreme Court of the United States to be holden
 at Washington on the second (2d) Monday of October next:

Now, the condition of the above obligation is such that if the said Flag-
 staff Silver Mining Company of Utah (limited) and Andrew G. Hunter
 shall prosecute their writ of error to effect, and answer all damages and
 costs if they fail to make their plea good, then the above obligation to
 be void, else to remain in full force and virtue.

G. BILLING. [SEAL.]
 A. HAVANER. [SEAL.]
 F. W. BILLING. [SEAL.]

56 Sealed and delivered in presence of—
 JAS. H. BEATTY.

Approved by—

MICHAEL SCHAEFFER,
Chief Justice Supreme Court Utah Territory.

(Indorsed :) In the Supreme Court of the United States of America.
 The Flagstaff Silver Mining Company of Utah (limited) et. al., plaintiffs
 in error, vs. George Cullins, defendant in error. Security in error. Filed
 March 23d, 1878. E. T. Sprague, clerk sup. court.

57 TERRITORY OF UTAH,
County of Salt Lake, ss :

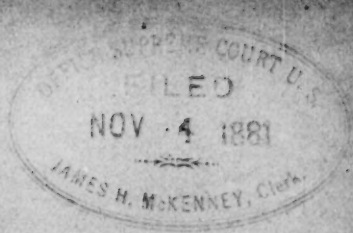
I, E. T. Sprague, clerk of the supreme court of said Territory, in obe-
 dience to the writ of error and order for appeal hereto attached, here-
 with return to the Supreme Court of the United States said writ and
 order, the citation thereon, and the foregoing attached transcript of the
 record, proceedings, and judgement had in said supreme court of Utah
 Territory in the cause in said writ entitled; and I do hereby certify that
 said writ, order, and citation are the originals thereof, and that said
 transcript of the record and proceedings, as well of the district
 court of the 3d judicial district as of said supreme court of said Terri-
 tory, and of the opinion of said last named court, and of bonds on ap-
 peal, are full, true, correct, and complete copies of the several originals
 thereof and endorsements thereon on file or of record in my office.

In testimony whereof I have hereunto set my hand and affixed the
 seal of said supreme court of Utah Territory, at Salt Lake City, this 2d
 day of April, A. 1878.

[SEAL.]

E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

(Indorsement on cover :) No. 326. The Flagstaff Silver Mining Com-
 pany of Utah (limited) and Andrew G. Hunter, plaintiffs in error, vs.
 George Cullins. Utah Ter'y sup. court. Filed 4th November, 1878.



Supreme Court of the U. S.

OCTOBER TERM, 1881.

**THE FLAGSTAFF SILVER MINING
COMPANY OF UTAH, (Limited), et al. Pl'tff
in Error**

vs.

GEORGE CULLINS, Def't in Error.

No. 80

WALTER H. SMITH,
Att'y for Plaintiff in Error.

Supreme Court of the U. S.

THE FLAGSTAFF SILVER
MINING COMPANY OF UTAH,

(LIMITED), *et al.*

Pl'tff in Error,

vs.

GEORGE CULLINS,

Def't in Error.

Oct. Term, 1881.
No. 80.

This is a writ of error to the Supreme Court of the Territory of Utah.

The defendant in error brought suit against the plaintiff in error in the District Court of the Third Judicial District of that Territory.

He alleged in his declaration that the defendant below was a foreign corporation organized under the laws of and located in the Kingdom of Great Britian; that it owned and worked a certain mine and mining claim in the Little Cottonwood Canon and mining district, Salt Lake County, Territory of Utah, located and known as the Flagstaff mine; that the defendant, on the 14th of December, 1873, entered into a contract with the plaintiff, "by which the plaintiff agreed to work for said defendant in and upon its said mine, as a miner, *in superintending and directing the working thereof* from that time for and during an indefinite time thereafter" at the rate of thirty-two hundred dollars per year; that he did so work "in and upon said Flagstaff mine as a miner,

in directing and superintending the working thereof" from the 15th of December, 1873, to and including the 31st day of December, 1876, and that there remained due to him from the defendant for said service, the sum of \$1600, and interest thereon at ten per cent. per annum, from the 1st of January, 1877; that he had duly filed his notice that he intended to hold a lien on said mine for said sum. He asked for a judgment for said sum and that it might be adjudged a lien on said mine.

The defendant for answer to said claim, denied in detail most of the allegations of plaintiff's declaration. It admitted that there was due to the plaintiff the sum of \$35, which sum the defendant had offered to pay and was still willing to pay but the plaintiff refused to receive the same.

It further alleged that the "plaintiff, during the said employment for this defendant did not perform any work or labor as a miner upon defendants' said Flagstaff mine, in said Salt Lake county; that his said employment consisted in superintending and watching over the workmen and laborers employed in working defendant's said mine, in the shipping of defendant's ore produced from said mine, and generally in managing and directing the business of this defendant at Alta city; and in buying at Salt Lake city, in said county, defendant's mining supplies; and that for such services the plaintiff is not entitled to a miner's or other lien upon defendant's said mine or other property."

The case was submitted to the court, without the intervention of a jury, and the court made the following finding of fact.

"That the defendant, the Flagstaff Silver Mining Company of Utah (limited), and hereinafter called 'said company,' on the 14th of December, 1873, was, and ever

since has been, a corporation organized under the laws of the Kingdom of Great Britian, and during all said time has owned, and until and including the 23d day of December, 1876, worked a certain mine called the 'Flagstaff,' situated in Little Cottonwood mining district, Salt Lake county, Utah.

2d. That from the 14th day of December, 1873, and to and including the 23d day of December, 1876, one J. N. H. Patrick was the general agent and manager of the mining and smelting business of said company in America, and had full power to make and carry out all contracts in said company's business.

3d. That on or about the 14th day of December, 1873 the said company by said J. N. H. Patrick, its agent for that purpose, duly authorized, employed the plaintiff for an indefinite time thereafter, to direct the work in its said mine, and with authority to employ and discharge miners and procure and purchase supplies for working said mine, and that it was the duty of the plaintiff, by virtue of said employment, to plan, oversee and direct the work in said mine, direct the shipping of ore, and generally to control and direct the actual working and development of the mine; that the plaintiff, while in the employment of said company, performed said duties, and in the performance thereof did some manual labor; that by the terms of said employment the plaintiff was to have \$300 per month.

4th. That the plaintiff worked for said company, under said employment, from the 15th day of December, 1873, to and including the 23d day of December, 1876, and that the amount of wages earned during said time is \$10,870.

5th. That said company, from time to time, made

payments to the plaintiff on account of said work, all said payments amounting to the sum of \$9,300.

6th. That, at the commencement of the action, there was and still is due from said company to the plaintiff the sum of \$1,530 and interest thereon at the rate of ten per cent. from January 1, 1877, on which day all of said money was due, no part of which has been paid.

7th. That the plaintiff duly filed his notice of intention to claim a lien, &c."

The court gave judgment for plaintiff for the balance so found due and adjudged it to be a lien on the mine.

From this judgment an appeal was taken to the Supreme Court of the Territory where the judgment was affirmed.

A writ of error has been prosecuted to this court and it is now assigned for error.

That the said Supreme Court erred in affirming the said judgment of the District Court.

The statute of Utah regulating the case in controversy is in these words: "Any person or persons who shall perform any work or labor upon any mine, or furnish any materials therefor in pursuance of any contract made with the owner or owners of such mine, or of any interest therein shall be entitled to a miner's lien for the payment thereof, upon all the interest, right and property in such mine, by the person or persons contracting for such labor or materials at the time making such contract; said lien may be enforced in the same manner and with the same effect as a mechanic's lien, as provided by the laws of Utah."

Sec. 1221, Compiled Laws.

I maintain that the court erred in holding that the defendant in error was entitled to a lien on the mine for his services.

He has himself set forth in his declaration the true nature of his employment, and he should be held to his own statement of his claim. He says that he agreed to work for the defendant as a miner in "superintending and directing the working of the mine," and again in "directing and superintending the working thereof." He does not pretend that he actually performed any labor on the mine. The answer of the defendant alleges that he did not. The court found that he "in the performance thereof did some manual labor." To what extent is not found. If he had performed any, even the slightest, the finding is strictly true and yet I apprehend it should receive no consideration in this case. *Lex non curat de minimis*. The finding, to make it material, should be that he performed some *substantial* manual labor. That is not pretended. The court below gave no weight to this portion of the finding. The real question is this: Is the superintendent of a mine such a laborer as is entitled to a lien on the mine? If he is, then the judgment below was correct.

I shall endeavor to show that he is not.

It is not every species of labor that will entitle the laborer to a lien. It must be labor performed *upon* the mine and *directly* connected with it. The benefit accruing to the mine must spring directly from the labor and not remotely. A person who should furnish money to be used in paying the miners would not be entitled to the lien. Neither would one who should board them, not because it is not necessary that they should be fed, but because the benefit to the mine is indirect.

A superintendent does not perform any labor "upon the mine." He may not even be present at the mine. He can give his directions when absent.

The courts have held that he is not entitled to the lien because he does not perform labor on the mine, and because he is the representative of the corporation and to allow him to acquire a lien would be allowing the corporation to obtain a lien in its own behalf.

In *Foredice v. Gusby*, 12 Bush., (Ky.) 75, the Court said: "The architect or superintendent of the building had no lien by reason of his services. The character of labor performed by him is not such as is embraced by any of the provisions of the statute."

The statute of Kentucky is in the usual form.

In *McCormack v. Los Angeles W. Co.*, 40 Cal., 186, the Court said: "If every one who contributed indirectly and remotely to the work is entitled to a lien, no reason is perceived why a surgeon called to set a broken limb of one of the laborers whereby he will be enabled to resume work on the building might not assert a lien; but services of this nature, *not performed on the building*, are not within the provision of the statute."

In *Blakey v. Blakey*, 27 Mo., 39, this subject was considered, but as the case is fully stated in the one ^{here} cited, I shall content myself with a simple reference to it.

I now invite the attention of the Court to the case of *Smallhouse v. Kentucky & Montana Gold & Silver Mining Company*, 2 Montana, 445.

The statute, construed by the Court, is as follows:

"Every mechanic, builder, lumberman, artisan, workman, laborer or other person, who shall do or perform any work or labor upon or furnish any material, machinery, or fixtures for any building, erection, bridge, flume, canal, ditch, mining claim, quartz lode, ranch, city or town lots, or for repairing the same, upon complying with the provisions of this act, shall have for his work or labor done, or material, machinery or fixtures fur-

nished, a lien upon such building, erection, bridge, flume, canal, ditch, mining claim, quartz lode, ranch, city or town lots, or other improvements, to secure the payment of such work, or labor done, or material, machinery or fixtures furnished."

The opinion of the court was delivered by Wade, Ch. Justice. He said: "This is an action to foreclose a mechanic's lien. The plaintiff claims a lien upon a certain quartz mill, together with the engine, boiler, belting and other machinery belonging to and used in the mill, &c."

"To bring himself within the statute giving a lien to mechanics, builders, lumberman, artisans, workman and laborers, who shall perform work and labor upon any building, erection, mining claim, quartz lode, &c., the plaintiff alleges that on the 28th day of December, 1871, the aforesaid corporation hired the plaintiff, as its agent, manager and superintendent, to perform labor in and about the building, erection and completion of the mill, and houses mentioned, and also in working the claims named on the quartz lode at a salary of \$250 per month."

"Does this averment bring the plaintiff within the spirit and meaning of the mechanic's lien law?"

"The purpose of the legislature, enacting this statute, undoubtedly was to secure to the persons therein named, compensation for their labor upon the erections therein contemplated and within the scope of the statute. Its provisions should be liberally construed. It was designed for the protection of workmen, who by their labor, or materials furnished, have called property into being or added to its value, to the end that the property itself shall be held liable for the labor and materials that produced it. But it is not everyone who contributes to the erection of a building, or structure that is entitled

to a lien thereon. If the contribution was indirect, as if A should loan money to B for the purpose of enabling him to erect such a building and he should with the money thus loaned employ workmen, purchase materials and construct a building, A could not hold a mechanic's lien on the building for the money so loaned. In order to have the lien attach, the labor or materials must have been expended on the building itself and not upon something else that produced it as a result."

"From the nature of the plaintiff's employment, as averred by himself, it does not appear that he was an architect or laborer or that he labored directly in the construction of the buildings, &c., but rather that he was employed by the corporation at a fixed salary to manage and superintend its affairs at the place named. Undoubtedly he had the general oversight of the business of the company, of the workmen employed to labor upon the buildings, &c., and probably kept an account of the time, saw that they performed good service and earned their wages and, at stated times, paid them money, for all of which he rendered an account to the company. His services were useful and necessary, but they contributed only in an *indirect manner* to the construction and erection of the building."

"He stood very much in the situation of an owner directing and managing works of his own. He was the representative of the corporation, and, to the laborers under him, he was the corporation at the place where the labor was performed. This was not the kind of service that entitles one to a mechanic's lien. This view of the case is in harmony with the decisions of the Supreme Court of the State of Missouri, from whence we obtained our mechanic's lien law."

"In the case of *Blakey v. Blakey*, 27 Mo., 39, the plaintiff brought an action to enforce a mechanic's lien for work and labor done and materials furnished in building a house for defendant. His account was as follows: 'To 114 days services of self in working and superintending building from May 1st up to December 23, 1856, at \$3 per day, \$242.' In deciding this case the court said: 'The law gives the mechanic, builder, artisan, workman, laborer, or other person who may do or perform any work upon or furnish materials for any building, a lien on the same to secure the payment of the work done or materials furnished, but it has no such elastic power as is claimed for it in this case, and it cannot be stretched to cover besides the value of the work done and materials furnished, a claim for services performed by the builder for himself in superintending his own workmen.'"

"This superintendent stands in the place of the corporation, and to give him a lien for the kind of labor he performed might defeat the liens of the workmen and material men who actually constructed the building and would be giving a lien to the corporation itself."

"An agent employed to disburse money and pay off hands in the building of a house has no lien for his services as the statute was designed to protect the interest of a different class of persons from those agents employed to disburse money. Such services do not come within the spirit or letter of the act. *Edgar vs. Salisbury*, 17 Mo., 271; *Phillips on Liens*, § 156, 157."

According to these authorities the judgment below was erroneous and ought to be reversed.

WALTER H. SMITH,
Att'y for Plaintiff in Error.

Seen as before 24 N. Y. 482



IN THE
Supreme Court of the United States

THE FLORIDA WATER MINING COMPANY,
Plaintiff,

vs.
GEORGE F. KELLEY, Defendant.

BRIEF ON BEHALF OF DEFENDANT

1811

1812

1813

1814

1815

1816

1817

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1819

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1881.—No. 80.

THE FLAGSTAFF SILVER MINING COMPANY
OF UTAH (LIMITED) ET AL., PLAINTIFFS IN ERROR,

vs.

GEORGE CULLINS, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

The case is brought into this court by the appeal of the defendant below, the Flagstaff Company. The defendant Hunter, who set up, as assignee, certain miners' liens, not having appealed, no questions are brought into this court, save such as are raised by the answer (R. 3, 4) of the Flagstaff.

And upon this answer no question is brought up by this appeal, save that finding by the court, (R. 7,) as a conclusion of law from the facts found by the court, (R. 5, 6, 7,) that plaintiff Cullins was entitled to a judgment for \$1,530 and interest, and that the same was a lien on the property of the Flagstaff on 1st August, 1876, and that Cullins was entitled to a sale of said property.

Of course all facts found below are in this appeal taken as true.

The findings of fact (R. 5, 6) which relate to the claim of

Cullins are in findings Nos. 2, 3, 4, 5, 6, 7. These find, in substance and effect, that, through its agent, the said Cullins was duly employed and rendered services to the said company, and that the company, at the commencement of the action, owed Cullins a balance of \$1,530 and interest from the day it was due, January 1, 1877, and that no part of it was paid; that said service was continued from the 15th of December, 1873, to 23d December, 1876, and that on the 12th of January, 1877, Cullins filed and had recorded with the county clerk a notice in due form that he had, or intended to hold, a lien on said mine for his said labor; which was filed less than ninety days from completion of the labor, and that this action was commenced within less than a year after the completion of said labor.

The description of the service Cullins was employed to do, and which he did do, is found by the court in these words: (R. 5, 6.)

“That on or about the 14th day of December, 1873, the said company, by said J. N. H. Patrick, its agent, for that purpose duly authorized, employed the plaintiff for an indefinite time thereafter to *direct the work* in its said mine, and with authority to *employ and discharge miners*, and procure and purchase supplies for working said mine, and that it was the duty of the plaintiff, by virtue of said employment, to *plan, oversee, and direct the work* in said mine, direct the shipping of ore, and generally to *control and direct the actual working and development of the mine*; that the plaintiff, while in the employment of said company, *performed said duties*, and in the performance thereof *did some manual labor*; that, by the terms of said employment, the plaintiff was to have \$300 per month, and by a modification of said contract soon thereafter made with said company, acting by said agent, the plaintiff was also permitted to also superintend the working of a mine called the Last Chance without any abatement of pay from said company.”

The statute applicable to this lien is section 1221 of the

Compiled Statutes of Utah, and will be found in the court's opinion (R. 16) as follows:

"Any person or persons who shall perform *any work or labor* upon any mine or furnish any materials therefor in pursuance of any contract made with the owner or owners of such mine or of any interest therein shall be entitled to a miner's lien for the payment thereof upon all interest, right, and property in such mine by the person or persons contracting for such labor or materials at the time of making such contract; said lien may be enforced in the same manner and with the same effect as a mechanic's lien, as provided by the laws of Utah."

BRIEF.

Thus it is seen that this record brings here, as we have said, but one question, to wit, whether said service so rendered by Cullins was, within the sense of said statute, "*work or labor*" done by "*any person*."

What Cullins did was, as the court finds, to *direct the work* in its said mine, with authority to *employ and discharge miners* and procure and purchase supplies for working said mine, and that it was the duty of the plaintiff by virtue of said employment to *plan, oversee, and direct the work* in said mine, *direct the shipping of ore*, and *generally to control and direct the actual working and development* of the mine.

That the plaintiff, while in the employment of said company, *performed said duties, and in the performance thereof did some manual labor*.

Is the employment and discharge of the miners, purchase of their supplies, planning, overseeing, and directing the work, and generally controlling the working and development of the mine, and the doing of some manual labor in the discharge of their duties, either "*work or labor*" as meant by this statute?

The whole case *made* by this appeal is, did this statute mean to confine this lien to the labor of what are known as

"common laborers," as distinguished from those whose service relates mainly to procuring and directing of the ordinary labor at the mines? Appellant's contention is that the statute meant so to confine the lien.

It will be observed that the fourth finding of facts (R., p. 6) finds the exact day when Cullins's services, which were continuous, commenced, the day when they ended; and findings 5 and 6 of the same page find the exact balance due for said service, and that no part of it was paid; and finding 7 of the same page finds the exact day of filing and recording the notice for the lien; that such filing was less than ninety days from the completion of the labor, and that this action was brought within less than one year after the completion of the labor.

Hence the facts found bring the case exactly within the doctrine of this court in *Davis v. Alvord*, 4 Otto, 545, holding that such lien claimants must bring themselves by their notices within the provisions of the lien statute, and show compliance with those provisions, and must fix, with certainty, the commencement and completion of their work.

Having done this, then, as to the construction of their rights given by the statute under which they claim, as lien-holders, such lien-holders are entitled to the very opposite rule of construction of such statute to the one insisted upon below by the Flagstaff Company. That company insists that the statute, being in derogation of the common law, shall be construed strictly, and that the words therein, "who shall perform any work or labor upon any mine," shall be strictly construed and limited to "common labor."

This court said, in *Davis v. Alvord*, (*supra*), in speaking of the construction of a similar statute of Montana, "the statute giving liens to mechanics and laborers for their work and labor is to be liberally construed."

Under this rule so sanctioned by this court for construing such a statute, we submit that the defendant Cullins, who superintended the work in this mine and did some

manual labor therein, is, within the sense of the statute, "a person who performed work or labor upon" the mine.

This must, both upon principle and authority, be so.

Upon principle it is plain that this kind of work of superintendence is, as a contribution to the development and value of the mine, the very highest species of work or labor which can be bestowed upon the mine.

All the authorities say that the legal principle upon which mechanics' liens and laborers' liens, for the value of service, are, on principles of equity, made to override all mortgages, &c., put upon the property after said work was commenced, is that the work or service, so made a paramount lien, has tended to create or develop the subject-matter to which the lien attaches.

Keeping this principle in view, it is impossible to deny that Cullins's work was of a kind which (to here quote the words of the Supreme Court below, R., p. 17) "contributed more than any other to the development of the property."

We now turn to the authorities bearing upon this point.

Phillips on Mech. Lien, p. 222, sec. 158, asserts the law to be that "the labor and skill of an architect and *superintendent* of work upon a building are properly a part of the expense of erecting a building, and not unfrequently an indispensable and highly valuable part. As an item of such expense they *enter into and help to form the value of the building*, and there is no sound reason in the nature of things why the person who performs such labor and furnishes such skill should not receive the same protection as the carpenter or mason.

In support of this view taken by him, Mr. Phillips cites the case of *Knight v. Norris et al.*, 13 Minn., 473. This case was one arising under a statute which provides that "whoever performs labor, supplies materials, &c., or either of them, as the case may be," &c., and the court held "that a person who furnishes plans and specifications for, and *superintends* the work upon, a building, under a contract with

"common laborers," as distinguished from those whose service relates mainly to procuring and directing of the ordinary labor at the mines? Appellant's contention is that the statute meant so to confine the lien.

It will be observed that the fourth finding of facts (R., p. 6) finds the exact day when Cullins's services, which were continuous, commenced, the day when they ended; and findings 5 and 6 of the same page find the exact balance due for said service, and that no part of it was paid; and finding 7 of the same page finds the exact day of filing and recording the notice for the lien; that such filing was less than ninety days from the completion of the labor, and that this action was brought within less than one year after the completion of the labor.

Hence the facts found bring the case exactly within the doctrine of this court in *Davis v. Alvord*, 4 Otto, 545, holding that such lien claimants must bring themselves by their notices within the provisions of the lien statute, and show compliance with those provisions, and must fix, with certainty, the commencement and completion of their work.

Having done this, then, as to the construction of their rights given by the statute under which they claim, as lien-holders, such lien-holders are entitled to the very opposite rule of construction of such statute to the one insisted upon below by the Flagstaff Company. That company insists that the statute, being in derogation of the common law, shall be construed strictly, and that the words therein, "who shall perform any work or labor upon any mine," shall be strictly construed and limited to "common labor."

This court said, in *Davis v. Alvord*, (*supra*), in speaking of the construction of a similar statute of Montana, "the statute giving liens to mechanics and laborers for their work and labor is to be liberally construed."

Under this rule so sanctioned by this court for construing such a statute, we submit that the defendant Cullins, who superintended the work in this mine and did some

manual labor therein, is, within the sense of the statute, "a person who performed work or labor upon" the mine.

This must, both upon principle and authority, be so.

Upon principle it is plain that this kind of work of superintendence is, as a contribution to the development and value of the mine, the very highest species of work or labor which can be bestowed upon the mine.

All the authorities say that the legal principle upon which mechanics' liens and laborers' liens, for the value of service, are, on principles of equity, made to override all mortgages, &c., put upon the property after said work was commenced, is that the work or service, so made a paramount lien, has tended to create or develop the subject-matter to which the lien attaches.

Keeping this principle in view, it is impossible to deny that Cullins's work was of a kind which (to here quote the words of the Supreme Court below, R., p. 17) "contributed more than any other to the development of the property."

We now turn to the authorities bearing upon this point.

Phillips on Mech. Lien, p. 222, sec. 158, asserts the law to be that "the labor and skill of an architect and *superintendent* of work upon a building are properly a part of the expense of erecting a building, and not unfrequently an indispensable and highly valuable part. As an item of such expense they *enter into and help to form the value of the building*, and there is no sound reason in the nature of things why the person who performs such labor and furnishes such skill should not receive the same protection as the carpenter or mason.

In support of this view taken by him, Mr. Phillips cites the case of *Knight v. Norris et al.*, 13 Minn., 473. This case was one arising under a statute which provides that "whoever performs labor, supplies materials, &c., or either of them, as the case may be," &c., and the court held "that a person who furnishes plans and specifications for, and *superintends* the work upon, a building, under a contract with

the owner of the building, performs *labor* for erecting and constructing such building, and may obtain a lien therefor by taking the steps prescribed by the statute.

Phillips again, on p. 223, says: "Whatever enters into or is connected with a building essential to its use, ought to be treated as a part of the building, so that all who contribute their toil to make it valuable may have an equal chance to obtain compensation for their labor."

And in *Bank of Pennsylvania v. Gries*, 35 Pa. St., 423, a case affirming the District Court, the court says that—

"When a party, although denominated an architect, is under employment by the owner or contractor of a building, and devotes his time in making plans and drawings of the work to be done, and in *directing* and *overseeing* its execution in accordance therewith, he is within the statute, and entitled to file a lien for his *labor*. The services performed were labor—mechanical labor of a high order—contributing its proportionate value to the beauty, strength, and convenience of the edifice. Why is this not entitled to be considered as meritorious as mere manual labor with the tools of the trade? Both are necessary to the accomplishment of the end in view, and both are necessary, * * * and we think the very nature of the work for which the lien was filed was such as entitled plaintiff to file his lien."

The case of *Stryker v. Cassidy*, 76 N. Y., 50, is one arising under the mechanic's lien law of New York. Said act authorizes a lien to be created in favor of "any person who shall perform *any labor* or furnish any materials in building, altering, or repairing any house, &c., by virtue of any contract with the owner, &c." The court said, in speaking of the character of the services rendered by the plaintiff, that "the architect who *superintends* the *construction* of a building performs *labor* as truly as the carpenter who frames it, or the mason who lays the walls, and labor of a most important character. It is not any the less 'labor,' within the general meaning of the word, that is done by a person who is fitted by special training and skill

for its performance. The language quoted makes no distinction between skilled and unskilled labor, or between mere manual labor and the labor of one who *supervises, directs, and applies* the labor of others."

Under the same statute under which the last cited case arose, the same question as to construction was presented in the case of *Warner v. Hudson River R. R. Co.*, 5 How. Pr., 454. The decision of the court is expressed in the syllabus in these words: "The term 'laborers' includes not only those who personally perform labor, but all who do so by their servants and agents; also all *superintendents* over others engaged in actual labor upon the road."

In *Mutual Benefit Life Ins. Co. v. Rowand*, 26 N. J. Eq., 397, what is unanimously there decided is expressed in these words: "The act gives a lien to any person for labor performed or materials furnished for the erection and construction of the building. The man who draws the plans and *superintends and directs* the construction, is clearly within the provision."

Willamette Fall Trans. & Milling Co. v. Remick, 1 Oregon, 169, arose under a like statute, which provides "that all persons performing labor for the construction of any building shall have a lien, &c." From the facts it appears that Remick, while in the employ of said company, acted as overseer and assistant superintendent in the erection of certain buildings belonging to the company, and his services were held by the court to clearly come within the purview of the statute, and that he was entitled to the lien filed by him.

The case of *Capron v. Strout*, 11 Nev., 305, arose under a similar statute, and which is approved in this case by the court below, is one very similar to this, in that the plaintiff was employed as a foreman of a mine—as a "boss" to oversee the men at work in the mine, to keep their time, and to give them orders for their pay. The court, in rendering its decision, said: " * * * According to the findings, he cer-

tainly did work in the mine, though not with his hands, and it is clear that the direct tendency of his work was to develop the property. We think the foreman of work in the mine is as fully secured by the law as the miners who work under his direction."

The following cases hold substantially the same doctrine:

Mullegan *v.* Mullegan, 18 La. An., 20.

Lybrandt *v.* Eberly, 36 Pa. St., 347.

POINTS ON BRIEF OF PLAINTIFFS IN ERROR.

There is no sufficient assignment of errors by plaintiffs.

But, irrespective of this, we will now, in so far as it is not already answered by us above, review the same, and the cases therein cited as supporting the views taken by the counsel for the plaintiffs. The cases relied upon by him are few, and, as will be seen by a careful examination of the same, have, with one exception, substantially no application as precedents to the case now before this court.

The case of McCormack *v.* Los Angeles W. Co., 40 Cal., 186, which counsel assert to be one of their strongest authorities in support of their view taken of the law in this case, is wholly inapplicable and worthless as an authority here, in that the services rendered by the plaintiff in that case, as a *cook* for the workmen employed on the reservoir being constructed by the defendants in error, were too *remote*; and for *that* reason it was not *labor* within the statutory words—no more so than would be the bill of their tailor for the clothing upon the workmen.

The case in 2 Montana, 445, is, we submit, not in harmony with the body of decisions on this subject, and as an authority it is counterbalanced by the authority of the unanimous decision from which this appeal is taken. Its reasoning is in opposition to the body of cases which we have here cited, and as a persuasive opinion is really valueless.

Blakey v. Blakey, 27 Mo., 39, is distinguishable from the present one in this: that it was an attempt by a contractor to get a lien for services in superintending his own contract and workmen, a service which his contract bound him to perform.

In conclusion, we maintain that the authorities cited by opposing counsel, with the exception, perhaps, of the case in Montana, have little, if any, application as precedents in our case. Those cited by us are many, and some of them are of the highest order and authority, and the weight of decision in most, if not all the courts, is substantially uniform in support of the view as taken by us. We consider it useless, therefore, to cite further authorities sustaining the same doctrine, deeming those already cited sufficient in themselves to sustain our position.

We therefore ask that the judgment of the court below be affirmed with costs.

SHELLABARGER & WILSON,

Att'ys for Defendant in Error.

14-180

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~334~~ 87-88

J. H. FECHTENBURG AND J. A. LOVENGREEN, AS J. H. FECH-
TENBURG & CO., APPELLANTS,

VS.

THE BARK WOODLAND, HER TACKLE, &c., AND CARGO AND
FREIGHT, WM. W. TURNBULL AND CHARLES TURNBULL,
CLAIMANTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 12, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 334.

J. H. FECHTENBURG AND J. A. LOVENGREEN, AS J. H. FECH-
TENBURG & CO., APPELLANTS,

VS.

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INDEX.

	Original.	Print.
Libel	1	1
Consent as to bond for costs	3	1
Stipulation for libellants' costs	3	2
Stipulation waiving service of process	5	2
Stipulation for claimants' costs	5	3
Stipulation	7	4
Claim of agent	9	4
Exceptions to libel	10	5
Answer	11	6
Amendment of answer	14	7
Consent substituting proctor for libellants	15	8
Order substituting proctor for libellants	16	8
Testimony of N. B. Carlisle	17	8
A. T. Heaney	17	9
John Van Arsdale	18	9
N. B. Carlisle recalled	20	10
J. T. Degener	21	11
Charles Davison	21	12
Calvin Durand	22	12
Richard D. Perry	22	12
Archibald T. Heaney recalled	22	12
Deposition of J. A. Lovengreen	22	12
Consent that a commission issue	23	12
Order that a commission issue	23	12
Commission to examine J. A. Lovengreen and J. Niles	23	13
Interrogatories to J. Niles	32	17
to J. A. Lovengreen	35	18

case, may be given, and that the same may be executed by Frederick Ansoategui, of New York, and upon such new bond being executed, we consent that the bond given at the time the libel was filed be cancelled.

SCUDDER & CARTER,
Cum'rs Proct'rs.

Stipulation for libellants' costs entered into pursuant to the rules and practice of this court.—Filed the 14th day of October, 1872.

District court of the United States for the southern district of New York.

Whereas a libel was filed in this court on the second day of March, in the year of our Lord one thousand eight hundred and seventy-one, by J. H. Fechtenburg and others against The Bark Woodland,
4 and freight, for the reason and causes in the said libel mentioned, and praying that said vessel and freight be condemned to pay libellants' claim and costs; and the said libellant and Frederick Ansoategui, surety, parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the libellants or their surety execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars.

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is, bound in the sum of two hundred and fifty dollars, conditioned that the libellants above named shall appear and answer to the cause and to interrogatories, and shall pay all such costs as shall be awarded against them by this court, or, in case of appeal, by the appellate court.

J. H. FECHTENBURG & CO.,
By F. ANSOATEGUI.
F. ANSOATEGUI.

Taken and acknowledged this 14th day of October, 1872, before me.

JOHN A. OSBORN.

U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, ss:

Frederick Ansoategui, party to the above stipulation, being duly sworn, doth depose and say that he resides in the southern district of New York, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

F. ANSOATEGUI.

Sworn to this 14th day of October, 1872, before me.

JOHN A. OSBORN,

U. S. Commissioner.

Recorded the 14th day of October, 1872.

Clerk.

J. H. FECHTENBURG AND OTHERS }
 against
THE BARK WOODLAND AND FREIGHT. }

It is hereby stipulated and agreed that the service of process in this

case be waived, upon the claimants appearing and filing claim to said vessel and freight, and answering within twenty days from date, and the claimants entering into stipulation for costs and value, the latter in sum of \$9,000, and the claimants hereby agree to appear and answer within the above time.

March 2, 1871.

BENEDICT & BENEDICT,
Libellants' Proctors.
SCUDDER & CARTER,
Proctors for Claimants.

*Stipulation entered into pursuant to the rules and practice of this court.—
Filed the 2d day of March, 1871.*

District court of the United States for the southern district of New York.

Whereas a libel was filed in this court, on the 2d day of March, 6 in the year of our Lord one thousand eight hundred and seventy-one, by J. H. Fechtenburg and Lovengreen, composing the firm of J. H. Fechtenburg & Co., against the bark Woodland, her tackle, &c., and freight, for the reasons and causes in the said libel mentioned, and praying that said bark be condemned and sold, and the parties hereto, hereby consenting, and that in case of default or contumacy on the part of the claimant or his surety, execution for the sum of two hundred and fifty dollars may issue against their goods, chattels, and lands; and whereas, also, a claim has been filed in said cause by Archibald T. Henly as agent:

Now therefore, it is hereby stipulated and agreed for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is hereby, bound in the sum of two hundred and fifty dollars, conditioned that the claimant above named shall pay all costs and expenses which shall be awarded against by the final decree of this court, or upon appeal by the appellate court.

A. T. HENEY.
JAMES STAFFORD.
WM. W. TURNBULL.

Taken and acknowledged this 2d day of March, 1871, before me.

GEO. F. BETTS,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, ss:

James Stafford, party to the above stipulation, being duly sworn, doth depose and say, that he resides in the eastern district of New York, that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

JAMES STAFFORD.
A. T. HENEY.

7 Sworn to this 2d day of March, 1871, before me.

GEO. F. BETTS,
U. S. Commissioner.

Recorded the 2d day of March, 1871.

, Clerk.

Stipulation, entered into pursuant to the rules and practice of this court.—

Filed the second day of March, 1871.

District court of the United States for the southern district of New York. In admiralty.

Whereas a libel was filed on the second day of March, in the year of our Lord one thousand eight hundred and seventy-one, by J. H. Fechtenburg & Lovengreen, composing the firm of J. H. Fechtenburg & Co., against the bark Woodland, her tackle, &c., for the reasons and causes in the said libel mentioned; and whereas, the issuing of process, and the seizure of said bark and freight have been waived by the claimant of the same, and whereas the proctors for libellants have consented that said bark and freight be released on a claim being filed, and stipulations for costs and value of bark and freight, the latter in the sum of nine thousand dollars, being also filed, as appears from said consent now on file in said court; and the parties hereto hereby

consenting and agreeing, that in case of default or contumacy on the part of the claimant or his surety, execution for the above amount may issue against their goods, chattels, and lands:

Now, therefore, the condition of this stipulation is such, that if the stipulators undersigned shall at any time, upon the interlocutory or final order or decree of the said district court, or of any appellate court to which the above named suit may proceed, and upon notice of such order or decree to Scudder & Carter, esquires, proctors for the claimant of said bark and freight, abide by and pay the money awarded by the final decree rendered by the court or the appellate court if any appeal intervene, then this stipulation to be void, otherwise to remain in full force and virtue.

A. T. HENEY.

JAMES STAFFORD.

WM. W. TURNBULL.

Taken and acknowledged this 2d day of March, 1871, before me.

GEO. F. BETTS,

U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, ss:

James Stafford and Archibald T. Heney, parties to the above stipulation, being duly sworn, each depose and say, that they reside in the eastern district of New York, that they are worth the sum of nine thousand dollars over and above all their just debts and liabilities.

JAMES STAFFORD.

A. T. HENEY.

Sworn to this 2d day of March, 1871, before me.

GEO. F. BETTS,

U. S. Commissioner.

We approve of the above bond dated March 2d, 1871.

At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court rooms, in the city of New York, on Thursday, the second day of March, in the year of our Lord one thousand eight hundred and seventy-one.

Present, the honorable Samuel Blatchford, district judge.

THE BARK WOODLAND, HER TACKLE, &C., AND }
 freight, }
adm. }

J. H. FECHTENBURG ET AL.

And now, Archibald T. Heney, intervening as agent for the interest of William W. Turnbull and Charles Turnbull in the said bark, appears before the honorable court and makes claim to the said &c., as the same are attached by the marshal, under process of this court, at the instance of J. H. Fechtenburg et al., and the said Archibald T. Heney avers that he was in possession of the said bark at the time of the attachment thereof, and that the persons above named are true and bona fide owners of the said bark, and that no other person is the owner thereof, and that the said Heney is the true and lawful bailee thereof. Wherefore he prays to defend accordingly.

TURNBULL & CO.,
 By A. T. HENEY,
As Agent.

SCUDDER & CARTER,
Proctors for Claimant.

10 SOUTHERN DISTRICT OF NEW YORK, 87:

Archibald T. Heney, being duly sworn, deposes and says that he resides in the eastern district of New York; that he is the agent of the owners above named; that the owners of said bark reside in St. John, New Brunswick, and that this deponent is duly authorized to put in this claim in behalf of the owner of the said bark, and that the said claim is true of the knowledge of this deponent except as to the matters therein stated on information and belief, and as to such matters he believes it to be true.

A. T. HENEY.

Sworn to and subscribed this 2d day of March, A. D. 18 , before me.
 GEO. F. BETTS,
U. S. Commissioner.

To the honorable Samuel Blatchford, judge of the district court of the United States for the southern district of New York.

The exceptions of William W. Turnbull and others, owners of the British bark Woodland, to the libel of J. H. Fechtenburg and Lovengreen, composing the firm of J. H. Fechtenburg & Co., of St. Thomas, West Indies, against the British bark Woodland, her tackle, &c., and freight, allege that the said libel is informal and insufficient, as follows:

FIRST EXCEPTION. That it does not state facts sufficient to constitute a cause of action against the said vessel. If the libellants are entitled to maintain any suit at all, upon the alleged drafts or bills of exchange, such suit should be an action in personam, and not an action in rem.

11 SECOND EXCEPTION. Because the allegation in the second article of said libel, that the master "gave to whomsoever might be the holders of said drafts or bills of exchange a lien upon said vessel, freight, and cargo," is an allegation of a mere conclusion of law, and one not justified by the facts; because the master, by his said alleged drafts or bills of exchange, gave no lien upon either vessel, freight or cargo, which can be enforced by an action in rem; but, on the contrary,

if the said Niles & Co. ever, by any means, acquired a lien upon said vessel, freight or cargo, the same was waived by the acceptance of said drafts or bills of exchange, and the credit transferred from the vessel, freight, and cargo to the owners thereof.

THIRD EXCEPTION. Because the allegation, in the second article of said libel, that "the said Niles & Co. took up said money on said drafts of the libellants, and duly assigned to the said libellants the said drafts, and said demand for repairs and supplies, disbursements and charges, and advances, and the lien therefore upon said bark, freight, and cargo, the said libellants advanced said money on the credit of said vessel, and cargo, and freight, and owners of said lien," is so indefinite and uncertain that the precise nature of the charge is not apparent.

SCUDDER & CARTER,

Proctors for Claimants.

To the Hon. Samuel Blatchford, judge of the district court of the United States for the southern district of New York :

The answer of William W. Turnbull and others, owners of the British bark Woodland, to the libel and complaint of J. H. Fechtenburg and

• Lovengreen, comprising the firm of J. H. Fechtenburg & Co., against the British bark Woodland, her tackle, &c., and freight, respectfully shows:

12 First. Your respondents admit that the said bark is now within jurisdiction of this court, but deny the other allegation of the first article of said libel.

Second. Your respondents admit that the said bark Woodland was in the port of St. Thomas in the month of January, 1871, and deny all the other allegations of the second article of said libel contained except as hereinafter admitted.

Third. Your respondents deny the allegations contained in the third article of said libel.

Fourth. Further answering, your respondents admit that while the said bark was at St. Thomas, aforesaid, her master drew two certain drafts or bills of exchange upon the owners of said vessel, and delivered the same to the firm of J. Niles & Co., but they deny that these drafts created any lien upon either vessel or cargo. Your respondents have no knowledge, and therefore deny that the said Niles & Co. took up the money on said drafts of the libellants, or duly, or otherwise, assigned the said drafts or the alleged demand for repairs, supplies, disbursements, charges or advances, on the alleged lien, therefor to the libellants; and your respondents deny that the alleged advances for which such drafts were given were made for the purposes of said vessel, or on her credit, and allege that a large portion of such alleged advances, if made at all, were made for the pretended purposes of the cargo of said vessel, and on the credit of such cargo; and they are advised and insist that neither the vessel nor the freight is liable for the same, and allege that this court has no jurisdiction over the case, and that neither vessel nor cargo should be held responsible.

13 Fifth. Further answering, your respondents allege that when such drafts were given the said bark was engaged on a voyage from the port of Montevideo to the port of New York, having a cargo on board, and had put into St. Thomas for repairs; that an agreement was made between the captain of said bark and the said firm of J. Niles & Co. by which the latter were to act as the agents of said vessel and her cargo, for which they were to receive a commission of two and one-half per cent. upon the value of her cargo; that the cargo was also to

be stored for two per cent. upon its value. That in the settlement of the accounts the cargo was valued at one hundred and twenty-five thousand dollars gold, and the percentage aforesaid estimated upon that basis, and the drafts drawn made to include the percentage so arrived at. That in fact such valuation was greatly in excess of the true market value of such cargo, which was not worth to exceed eighty thousand dollars, gold, and the percentage aforesaid, if it should have been allowed at all, should have been estimated only upon the last-named sum.

Sixth. That another item, going to make up the amount of said drafts, was the sum of one thousand two hundred and fifty dollars, being one per cent. upon such valuation for fire insurance alleged to have been made upon the said cargo. That such fire insurance, if actually made, was illegal and unauthorized, and your respondents are advised and insist that neither the cargo nor its owners, nor the said bark nor freight, nor their owners, should be held responsible therefor.

Seventh. That the amount of the foregoing overcharges and unauthorized alleged expenses which have gone to make up such drafts is the sum of three thousand two hundred and seventy-five dollars, gold,
 14 as to which amount your respondents are advised and insist that neither the said bark nor freight is liable in any event.

Wherefore your respondents pray that the libel herein may be dismissed with costs, and that this honorable court will be pleased to decree that law and justice in the premises may be administered.

SCUDDER & CARTER,

CPmts Procts.

SOUTHERN DISTRICT OF NEW YORK, ss:

Archibald T. Heney, being duly sworn, deposes and says that he is the agent and attorney in fact of William W. Turnbull and others, owners of the British bark Woodland, the above-named claimants herein; that he has read the foregoing answer, and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true. That his knowledge of the facts therein stated is derived from statements of the officers of the said bark and from his agency for the said claimant; that the reason this verification is not made by the above-named claimants is that they are absent from said district and from the State of New York.

A. T. HENEY.

Sworn this 4th day of January, 1872, before me.

[L. s.]

GEORGE S. MCKAY,

Notary Public, New York.

SCUDDER & CARTER,

Proctors for Clm'ts.

(Amendment of answer allowed on the trial.)

Amendment in fourth article: That while the said bark was at
 15 St. Thomas aforesaid, her master drew three certain drafts or bills of exchange, &c.

Add eighth article: That the foregoing three drafts and all the charges and disbursements made in Saint Thomas were made under a fraudulent agreement and conspiracy between the said master and said J. Niles & Co.; that the said charges were to be fraudulently increased,

and that the said master and said Niles & Co. were to share in such drafts or the proceeds thereof, and that by reason of such fraud the said drafts were void, and that the said J. Niles & Co. and the libellants never had any lien on said vessel.

U. S. district court.

J. H. FECHTENBURG AFD OTHERS }
vs.
 BARK WOODLAND, &C. }

We hereby consent that James Ridgway, esq., be substituted as proctor for the libellants in the above-entitled action in our place and stead, and that an order be entered to this effect.

BENEDICT & BENEDICT,
Libellants' Proctors.

New York, October 17th, 1872.

At a stated term of the district court of the United States of America for the southern district of New York, held at the United States
 16 court-rooms in the city of New York on Thursday, the seventh day of November, in the year of our Lord one thousand eight hundred and seventy-two.

Present, the honorable Samuel Blatchford, district judge.

J. H. FECHTENBURG ET AL. }
vs.
 THE BARK WOODLAND, HER TACKLE, AP- }
 parel, &c. }

On reading and filing the annexed consent, and on motion of James Ridgway for the libellants, it is ordered that James Ridgway be, and he is hereby, substituted as proctor for the libellants in the above-entitled cause, in the place and stead of Benedict & Benedict.

SAMUEL BLATCHFORD.

J. H. FECHTENBURG }
vs.
 THE BARK WOODLAND, &C. }

DEC. 3, 1873.

Answer allowed to be amended by amendment filed.

Deposition of J. Niles.

Deposition of J. A. Lovengreen.

3 original drafts put in.

17 Letters of Turnbull & Co. to Capt. Titus—notarial copy, St. John, N. B., December 24, 1870, admitted under objection.

DEFENCE.

Motion to dismiss libel denied.

NATHANIEL B. CARLISLE sworn :

Commission business ; trades with South America ; hides principally ;

had cargo on Woodland; she arrived 17 February, 1871; I received 1,794 hides; 109 short.

DECEMBER 4, 1878.

Deposition of Van Speyk Richardson.

ARCHIBALD T. HEANEY sworn:

Ship agent or broker, New York; Heaney & Parker, in 1871, was agents of the bark Woodland in New York; Turnbull & Co., of St. Johns, were owners; knew them; no interest in vessel; collected freight on her cargo; was on board of her; cargo was hides and skins; Capt. Titus commanded her when she arrived here; I understand he died a year ago; have no doubt of it: saw him after he arrived here.

(Bill of exchange for \$1,500.)

I received this from Capt. Titus.

Offer to show under what circumstances six per cent. came into hands of witness.

(Objected to. Excluded.)

Had correspondence with Swift & Co. after this occurrence.

18 Offer to prove that this draft for \$1,500 was given to Heaney by Capt. Titus, with statement made by Capt. Titus, that he was instructed by J. Niles & Co. to negotiate this draft in city of New York, without knowledge of his owners.

(Objected to. Excluded. Exception.)

The two drafts were presented to me, and I did not pay them.

Evidence excluded to show under what circumstances draft for \$1,500 came into hands of Heaney.

Offer to show by decisions of English courts, and especially by Stainbank vs. Fenning, 6 Eng. Law and Eq. 412, and Stainbank vs. Shepperd 20 Eng. Law and Eq. 547, that master of English vessel has no authority to bind vessel except by hypothecation, in which payment of money borrowed is made to depend on arrival of ship, nor to pledge credit of vessel, and personal credit of owners. (Carrington vs. Pratt. 18 Howard 69.)

JOHN VAN ARSDALE sworn:

Clerk in custom-house; manifest shown of bark Woodland; arrived February 17, 1871, from Montevideo; sworn to by master; all cargo on board.

Taken on board at Montevideo:

		5,179 dry ox and cow hides.—Napier & Co.	
N. B. F.		1,000 " " " " " "	Baring Bros. & Co.
R. S.		1,000 " " " " " "	Order.
N. D. C.		1,000 " " " " " "	"
C. D. E.		1,000 " " " " " "	"
N. D. C. 2.		868 " " " " " "	"
K.			"
M. R. & Co.			"
Do. 577, 676.			"
72, 79.		35 dry kips.	"
Do.		2,359 dry ox and cow hides.—C. A. Auffaermordt & Co.	
		100 bales sheep skins.	"
		1,714 dry ox and cow hides.	"
		200 bales sheep skins.	"
19		4 bales horse hair.	Baring Bros. & Co.
N. M.		12 " " " " " "	"
C. S. 1 to 12.		1 bale cow hair,	"
Do. 13.			"
R. 2.		102 dry kip skins.	John Fair & Co.
		109,740 shin bones.	"
		2 cases merchandise.	

A quantity of old copper, stripped from ship's bottom at St. Thomas, to remain on board.

Taken on board at Montevideo, discharged and reshipped at St. Thomas:

220 bales sheep skins.
11,992 ox and cow hides and kip skins.
109,740 shin bones.
2 small cases, contents unknown.

A lot old copper off ship's bottom.

SOLD AT ST. THOMAS.

M. R. C.	97 bales sheep skins.
R. S.	544 hides.
N. S.	2 kips.
B. G. P.	5 hides.
N. D. C.	
49 hides.	
495 "	
69 "	
103 "	

HIDES.

5,179	544
1,000	2 kips.
1,000	5
1,000	49
868	495
35 dry kips.	69
2,359	103
1,717	
102 dry kips.	1,267
13,260	
1,267	
11,993	

20 1,267
11,993

SHEEPSKINS.

100 bales.
200 "
300 "
97 "
203 "

Of the two small cases, one was a package of prepared meat.

NATHANIEL B. CARLYLE recalled:
I had N. D. C. 1,000 hides, order.

N. D. C. 2 868 " order.

K. 35 kips, order.

1,903

Of these I got 1,794; 109 were short.

Hides average 22 lbs. weight.

Kips " 10 to 12 lbs. weight.

Kips, duty paid, and of Nov., 1870, and Dec., 1870, in N. Y. Sales
27½ cts. gold, per pound.

Hides same time, 25 to 25½ cts. gold, per pound.

Duty on kips and hides, 10 per cent. ad valorem on foreign value.

Freight charges, ½ cts. a pound and 5 per cent. primage.

13,260 hides

22 lbs. each hide.

26,520

26,520

25 cts. a lb. 4) 2,917.20 lbs.

72,930 gold.

21 Invoice cost 10 to 15 per cent. less than market prices here.

72,930

7,293 10 per cent duty.

65,637 value in bond.

6,563 70 deduct to get foreign value.

59,073 30

11,993 arrived.

22 lbs. each.

23,986

23,986

4) 2,638.46

65,961.50 with duty.

6,596.15 10 per cent. duty.

59,365.35

5,936.53 10 per cent. duty to get foreign value.

53,428.82

I did not instruct Capt. Titus to insure my cargo in St. Thomas.

Cross-examined :

Before Jan. 4, 1871, duty 10 per cent on hides and kips.

JOHN F. DEGENER sworn :

Importer; C. A. Auffard & Co., N. Y., had on Woodland some goods; rec'd 203 bales unwashed sheepskins, also 3,532 hides and kips.

Sheep's skins were at time about \$100 a bale in currency.

CHARLES DAVISON sworn :

23 Edw'd F. Davison & Co. We were consignees by Woodland of 102 dry kips, 66,619 lbs. shin bones; all that were on the ship.

(K. 2, 102 dry kips, John Fair & Co.)

C. S. 13 bales hair, Baring Bros. & Co.

N. M. 4 bales horse hair, do.

Q. S. 1,000 hides, Baring Bros. & Co.; of the hides, 52 short; of the kips, 2 short.

Shin bones sold \$30 per 2,240 lbs.; gross, \$892.19 currency.

Hair, 28 c'ts gold, Feb. 27, 1871; 13 bales, 13,712 lbs. nett, 28 cts., \$3,839.36 gold; 4 bales, 4,572 lbs., at 28, \$1,280.16 gold.

No duty on hair or bones.

Cross-examined.

CALVIN DURAND sworn :

Foreign commerce; consignee by Woodland, 1,000 hides, C. D. 2, to order.

RICHARD D. PERRY sworn :

In 1870 was managing partner of Napier & Co.; had on Woodland 5,179 hides, N. B. P.; received all but 564; ship did not bring them.

ARCHIBALD T. HEANEY recalled :

Manifest made up in our office from bills of lading; at time Burns swore on manifest he was master; Titus was not.

FOR LIBELLANT.

Deposition of J. A. Lovengreen, taken for claimants May 7, 1873.

Admitted to be one of the libellants.

Certificate from C. H. to be produced of invoice value of 203 bales of sheepskins, consigned to C. A. Auffinord & Co., and of amount of duty paid thereon.

Also certificates as to same things as to the rest of the cargo.

23

U. S. district court.

J. H. FECHTENBURG ET AL.

vs

THE BARK WOODLAND, HER TACKLE, APPAR-
el, &c., and freight and cargo.

We hereby consent that a commission issue out of and under the seal of this court, directed to Conrad C. Simmons, of Saint Thomas, West Indies, to take the testimony of J. A. Lovengreen, J. Niles, and such other witnesses as may be produced on the part of libellants in the above entitled cause.

Dated New York, January 22d, 1873.

SCUDDER & CARTER,

Proctors for Claimants.

JAMES RIDGWAY,

Proctor for Libellants.

On the foregoing consent, it is ordered that a commission issue out of and under the seal of this court, directed to Conrad C. Simmons, of

Saint Thomas, West Indies, to take the testimony of J. A. Lovengreen, J. Niles, and such other witnesses as may be produced on the part of the libellants in the above entitled cause.

New York, January 30, 1873.

SAMUEL BLATCHFORD.

The President of the United States of America to Conrad C. Simmons, of Saint Thomas, West Indies, greeting :

Know ye that we, in confidence of your prudence and fidelity, 24 have appointed you commissioner, and by these presents do give you full power and authority diligently to examine upon their corporal oaths or affirmations, before you to be taken, and upon the interrogatories and cross interrogatories hereunto annexed, J. A. Lovengreen, J. Niles, and such other witnesses as may be produced on the part of libellants as witnesses on the part of libellants in a certain cause now pending undetermined in the district court of the United States of America for the southern district of New York, wherein J. H. Fechtenburg et al. are libellants vs. The Bark Woodland, her tackle, apparel, &c., and freight and cargo. And we do hereby require you, before whom such testimony may be taken, to reduce the same to writing, and to close it up under your hand and seal, directed to George F. Betts, esq., clerk of the district court of the United States for the southern district of New York, at the city of New York, as soon as may be convenient after the execution of this commission; and that you return the same when executed as above directed, with the title of the cause endorsed on the envelope of the commission.

Witness the honorable Samuel Blatchford, judge of the district court of the United States for the southern district of New York, at the city of New York, this 31st day of January, in the year of our Lord one thousand eighth hundred and seventy-three, and of our Independence the ninety-seventh.

[L. S.]

GEORGE F. BETTS,

*Clerk of the District Court of the United States
for the Southern District of New York.*

JAMES RIDGWAY,

Proctor for Libellants, 56 Broadway, New York City.

25

DIRECTION FOR EXECUTING THE COMMISSION.

The persons to whom such commission shall be directed, or any one of them, unless otherwise expressly directed therein, shall execute the same as follows:

1. They, or any one of them, shall publicly administer an oath to the witnesses named in the commission that the answer given by such witnesses to the interrogatories proposed to them shall be the truth, the whole truth, and nothing but the truth.

2. They shall cause the examination of each witness to be reduced to writing and to be subscribed by him and certified by such of the commissioners as are present at the taking of the same.

3. If any exhibits are produced and proved before them, they shall be annexed to the depositions to which they relate, and shall in like manner be subscribed by the witness proving the same, and shall be certified by the commissioners.

4. The commissioners shall subscribe their names to each sheet of the depositions taken by them; they shall annex all the depositions and exhibits to the commission, upon which their return shall be endorsed;

and they shall close them up under their seals, and shall address the same when so closed to the clerk of the court from which the commission issued or to the clerk of the county in which the venue shall be laid, as shall have been directed on the commission, at his place of residence.

5. If there is a direction on the commission to return the same by mail, they shall immediately deposit the packet so directed in the nearest post-office.

26 6. If there be a direction on the commission to return the same by an agent of the party who sued out the same, the packet so directed shall be delivered to such agent.

The above is an extract from the Revised Statutes of the State of New York, vol. 2, page 639, relating to the taking of testimony out of the State.

Instructions to commissioners.

Annexed to the commission is an extract from the statutes of the State of New York relative to the taking of testimony out of the State, which extract is directed by law to be annexed to the commission. But as it does not comprise everything necessary to be attended to by the commissioners, they are requested to observe the following more ample

INSTRUCTIONS.

I. All the commissioners named in the commission should have notice of the time and place of executing it; and if any of them do not act, let the fact that they were notified or could not be notified and the reasons for their not acting be stated.

II. The commission must be executed by the commissioner named therein.

III. The acting commissioner will examine the witnesses separately, after publicly administering to them the following oath or affirmation:

"You do swear that the answers which shall be given by you to the interrogatories proposed to you shall be the truth, the whole truth, and nothing but the truth, so help you God."

27 The oath shall be administered (except in cases hereinafter mentioned) by the witness laying his hand upon and kissing the Gospels.

But if the witness shall desire it, he shall be permitted to swear in the following form: "You do swear in the presence of the ever living God," and while so swearing he may or may not hold up his hand, in his discretion.

Or if the witness shall declare that he has conscientious scruples against taking an oath or swearing in any form, he shall be permitted to make his affirmation in the following form: "You do solemnly, sincerely, and truly declare and affirm," omitting the words "so help you God."

IV. The general style or title of the depositions must be drawn up in the following manner:

"Deposition of witnesses produced, sworn (or affirmed), and examined the day of , in the year one thousand eight hundred and , at , under and by virtue of a commission issued out of the district court of the United States for the southern district of New York in a certain cause therein depending and at issue, wherein J. H. Fechtenburg et al. are libellants vs. The bark Woodland, her tackle, apparel, &c., and freight and cargo, as follows:

"A. B., of [insert his place of residence and occupation] aged years and upwards, being duly and publicly sworn (or affirmed), pursuant to the directions hereto annexed, and examined on the part of the libellants, doth depose and say as follows: First. To the first interrogatory he saith, &c. [insert the witness's answer]. Second. To the second interrogatory he saith," &c., and so on throughout.

If he cannot answer, let him say that he knoweth not.

28 V. If there be any cross-interrogatories, the witness will go on thus:

"First. To the first cross-interrogatory he saith," &c., and so on throughout.

VI. When the witness has finished his deposition, let him subscribe it, and the acting commissioner will certify as follows:

"Examination taken, reduced to writing, and by the witness subscribed and sworn to this day of , 18 , before

"Commissioner."

VII. If any papers or exhibits are produced and proved, they must be annexed to the depositions in which they are referred to and be subscribed by the witness, and be endorsed by the acting commissioners in this manner:

"At the execution of a commission for the examination of witnesses, wherein J. H. Fechtenburg et al. are libellants vs. The bark Woodland, her tackle, apparel, &c., and freight and cargo.

"This paper writing was produced and shown to [insert the witness's name] and by him deposed unto at the time of his examination, before

"Commissioner."

VIII. The acting commissioners will sign their names to each half sheet of the depositions and exhibits.

IX. If an interpreter is employed, one of the commissioners will administer to him the following oath and certify thereto:

29 "You do solemnly swear that you will truly and faithfully interpret the oath and interrogatories to be administered to , a witness now to be examined, out of the English language into the language, and that you will truly and faithfully interpret the answers of the said thereto out of the into the English language."

Let the depositions be subscribed by the interpreter as well as by witness, and certified by the acting commissioners, as follows:

"Examination taken, reduced to writing, subscribed by the witness and by the sworn interpreter, and sworn to by the witness, this day of 18 , before

"Commissioner."

X. The commissioner will make return on the back of the commission by endorsement, thus:

"The execution of this commission appears in certain schedules hereunto annexed.

"Commissioner."

XI. The depositions and exhibits (if any) must be annexed to the

commission, and then the commission, the directions, the interrogatories, cross-interrogatories, depositions, and exhibits must be folded into a packet and bound with tape. The acting commissioners are to set their seal at the several meetings or crossings of the tape, endorse their names on the outside, and direct it thus: "U. S. district court, southern district of New York. Vol. 23, 511. J. H. Fechtenburg et al. vs. the bark Woodland, her tackle, apparel, &c. To George F. Betts, esquire, clerk of the district court of the United States for the southern district of New York, at the city of New York, U. S. A."

XII. When the commission is thus executed, made up, and directed, it must be returned in the manner specified in the direction of the commission, if there be any.

XIII. If there be no direction on the commission specifying the manner in which it is to be returned, then it must either be delivered to the court by one of the acting commissioners personally, or else be forwarded by some person coming to this place, and who must be liable on his arrival to make oath before one of the judges or the clerk of the court:

"That he received the same from the hands of A. B., one of the commissioners, and that it had not been opened or altered since he so received it."

XIV. In case of returning the commission by mail, it is to be deposited by one of the acting commissioners in the nearest post-office, he making the following endorsement thereon:

"Deposited in the post-office at this day of 18 , by me.

"Commissioner."

31 In case of returning the commission by a vessel, it is to be deposited by one of the acting commissioners in the letter bag of such vessel, he making upon the commission the following endorsement:

"Deposited in the letter bag of the now lying at and bound for the port of New York, this day of 18 , by me.

"Commissioner."

The commissioners are requested to be very careful to observe the foregoing instructions, as the smallest variance may vitiate the execution of the commission.

If the commission be returned by an agent, let him be instructed to call, on his arrival at this place, upon James Ridgway, esq., counsellor at law, number 56 Broadway, New York City, U. S. A., who will direct him as to its delivery.

U. S. district court, southern district of New York.

J. H. FECHTENBURG ET AL.

vs.

THE BARK WOODLAND, HER TACKLE, APPAR-
el, &c., and cargo and freight.

Interrogatories to be administered at St. Thomas, West Indies, to J. A. Lovengreen and J. Niles, and such other witnesses as may be produced and examined on the part of the libellants.

32 INTERROGATORIES FOR THE EXAMINATION OF J. NILES.

First interrogatory. What is your name, age, and occupation, and where do you reside?

Second interrogatory. Was you, during the winter of 1870-'71, the principal member of the firm of J. Niles & Co., commission merchants and ship agents, doing business in St. Thomas? If yea, state how long that firm has been engaged in such business, and how long an experience you have had in such business.

Third interrogatory. Did the British bark Woodland, J. H. Titus, master, of St John's, New Brunswick, arrive at St. Thomas in or about the month of November, 1870? If yea, state from what port she arrived, with what she was laden, and what was her condition.

Fourth interrogatory. Who attended to the business of that vessel at St. Thomas? If you answer that your firm attended to the business, state how they came to do so, and by what authority.

Fifth interrogatory. If, in answer to the 3d interrogatory, you answer that the Woodland arrived at St. Thomas in a disabled condition, state whether or not she was in need of advances for repairs and supplies, disbursements and charges, and, generally, what was done to refit her for sea again, and what, if anything, was done with the cargo laden on board thereof while the vessel was being refitted for sea, and

33 whether or not the same was material and necessary for said bark Woodland, to enable her to proceed with safety upon her intended voyage, and earn freight and passage money.

Sixth interrogatory. If, in answer to the 5th interrogatory, you say that the cargo was discharged, stored, a part thereof sold at public auction, the vessel repaired, and the remainder of the cargo reshipped at St. Thomas, state by what authority the same was done.

Seventh interrogatory. How long a time was occupied in discharging the cargo, repairing the vessel, and reshipping the cargo? State whether or not there was any unusual or unnecessary delay in performing that work, or expediting the departure of the Woodland from St. Thomas.

Eighth interrogatory. For the services rendered and expenses incurred by your firm for the bark Woodland and cargo, what, if any, acknowledgement of indebtedness did you receive, and from whom?

Ninth interrogatory. If, in answer to the eighth interrogatory, you say that on account of such services and expenses you received from J. H. Titus, master of the bark Woodland, his bills of exchange or drafts, one for \$2,000 and one for \$2,606.24, state whether the annexed are copies of said two bills of exchange or drafts.

Tenth interrogatory. Prior to accepting said drafts from Capt. Titus, had you or not agreed with him that the indebtedness of the bark Woodland and cargo should be defrayed by some other mode than by his drafts upon his owners? If yea, when was that agreement made, what was the mode agreed upon, and why was the same not adopted?

Eleventh interrogatory. If, in answer to the tenth interrogatory, you say that a change was made in the mode of payment, state whether or not the same was in consequence of Capt. Titus showing you a letter received by him from Messrs Turnbull & Co., the owners of the bark Woodland; and, if it was, append a copy of such letter, or so much thereof as relates to the drawing of drafts or bills of exchange by Capt. Titus; and state further what, if anything, you did towards obtaining the necessary funds from the firm of G. W. Smith & Co., alluded to in said letter, whether you succeeded in obtaining any funds from them, and what farther was agreed upon and done between you and Capt. Titus in regard to obtaining the necessary funds.

Twelfth interrogatory. After your firm had taken or agreed to take the two drafts already spoken of, what, if anything, did you do towards selling the same and taking up the money thereon for the repairs and supplies, disbursements and charges, for the purposes of said bark Woodland, and if you say that you offered them for sale to Messrs. J. H. Fechtenburg & Co., the libellants, state whether or not you, at the same time, showed them the said letter from Turnbull & Co. to Capt. Titus, and what was then said to you upon that subject by J. H. Fechtenburg & Co., and what, if anything, was then done by Capt. Titus in regard to the same?

35 Thirteenth interrogatory. State whether or not you accepted said drafts in consequence of the terms of said letter from Turnbull & Co.; and whether a bottomry or respondentia bond would have been a more or less expensive method of securing the payment of the money due your firm than by the drafts.

Fourteenth interrogatory. If you sold said two drafts to Messrs. J. H. Fechtenburg & Co., was your firm then indebted to them? State also whether you endorsed said drafts to said J. H. Fechtenburg & Co., at what discount you sold them said drafts, and whether J. H. Fechtenburg & Co. paid for the same.

Lastly. Do you know any other matter or thing of benefit or advantage to Messrs. J. H. Fechtenburg & Co., the libellants? If yea, state the same as fully and particularly as if you were interrogated thereto.

INTERROGATORIES FOR THE EXAMINATION OF J. A. LOVENGREEN.

First interrogatory. What is your name, age, and occupation, and where do you reside?

Second interrogatory. During the winter of 1870-'71 who composed the firm of J. H. Fechtenburg & Co.?

Third interrogatory. Was you acquainted with the fact of the arrival at St. Thomas, in November, 1870, of the British bark Woodland, in distress? State, if you know, what was done to refit her for sea.

36 Fourth interrogatory. Were or were not drafts on Messrs. Turnbull & Co., of St. John's, New Brunswick, owners of the bark Woodland, drawn by J. H. Titus, master of said bark, offered to your firm for sale? If yea, by whom and under what circumstances?

Fifth interrogatory. Was any, and, if so, what authority shown to you, and by whom, authorizing Capt. Titus to draw drafts on his said owners, Turnbull & Co.? If you answer that you was shown a letter received

by Capt. Titus from Turnbull & Co., append a copy of such letter, or so much thereof as relates to the drawing of drafts or bills of exchange by Capt. Titus.

Sixth interrogatory. Was you or your firm willing to buy said drafts in the form in which they were proposed to be made? If you answer no, state why you refused to buy them, and whether you then, and to whom, stated your reasons for such refusal.

Seventh interrogatory. In consequence of what you have last stated, were or were not the drafts made satisfactory to you, and in what respect; and had you any interview with Capt. Titus in regard to the same?

Eighth interrogatory. Were the drafts then purchased and received, and from whom, by you in the name and for the account of your said firm? If yea, state whether the annexed are copies of said drafts or bills of exchange, and how much, and to whom, you paid for said two drafts or bills of exchange.

37 Ninth interrogatory. State whether or not you bought said drafts in good faith, and relying upon the authorization contained in said letter from Turnbull & Co. to Capt. Titus; and whether a bottomry or respondentia bond would have been a less or more expensive way of defraying the charges against the bark Woodland and cargo than by drafts on the owners. And state, further, whether you would have bought said drafts without the remarks upon them "recoverable against the vessel, freight, and cargo."

Tenth interrogatory. When you bought said two drafts from Messrs. J. Niles & Co., were they indebted to you? State also at what discount you bought said drafts; whether your said firm paid said J. Niles & Co. for said two drafts, and whether your said firm are still the legal owners and holders of said two drafts. Lastly, do you know any other matter or thing of benefit or advantage to Messrs. J. H. Fechtenburg & Co., the libellants? If yea, state the same as fully and particularly as if you were interrogated thereto.

Lastly. Do you know any other matter or thing of benefit or advantage to Messrs. J. H. Fechtenburg & Co., the libellants? If yea, state the same as fully and particularly as if you were interrogated thereto.

INTERROGATORIES FOR THE EXAMINATION OF SUCH OTHER WITNESSES AS MAY BE PRODUCED ON THE PART OF THE LIBELLANTS.

First interrogatory. What is your name, age, and occupation, and where do you reside?

Second interrogatory. Was you acquainted with the fact of the arrival at St. Thomas, in November, 1870, of the British bark
38 Woodland in distress? State, if you know, what was done to refit her for sea, and whether or not the same was done with reasonable expedition and dispatch.

Third interrogatory. Have you any knowledge, and, if so, what, upon the subject of the making of the two drafts by Captain Titus (copies whereof are hereto annexed), and the sale thereof by Messrs. J. Niles & Co. to Messrs. J. H. Fechtenburg & Co., and the price paid therefor?

Lastly. Do you know any other matter or thing of benefit or advantage to Messrs. J. H. Fechtenburg & Co., the libellants? If yea, state the same as fully and particularly as if you were interrogated thereto.

JAMES RIDGWAY,
Proctor for Lib.

U. S. district court, southern district of New York.

J. H. FECHTENBURG ET AL.

vs.

THE BARK WOODLAND, HER TACKLE, &C.,
and cargo and freight.

Cross-interrogatories to be administered at Saint Thomas, West Indies, to J. A. Lovengreen and J. Niles, and such other witnesses as may be produced and examined on the part of the libellants.

39 CROSS-INTERROGATORIES FOR THE EXAMINATION OF J. NILES.

First cross-interrogatory. Are you a member of the firm of J. Niles & Co.? If so, state the nature of the partnership business, and how long you have been a member of such firm.

2d do. When and how did you first learn that the bark Woodland had arrived at Saint Thomas, and when and how did you learn what her condition then was?

3d do. State what means you had of knowing her condition at that time.

4th do. Did any one request you to perform any work or services or furnish any materials or make any expenditure of money for or on behalf of the bark Woodland or her cargo while she was at Saint Thomas in the winter of 1870 and 1871? If so, who requested you, and state in detail what work or services or material or expenditure of money, if any, you actually performed or furnished or made in accordance with such request?

5th do. State also whether you paid or agreed to pay any money for fire or other insurance on the bark Woodland or her cargo while they were at Saint Thomas in the winter of 1870 and 1871. If so, state how much you thus paid or agreed to pay, and state in detail what was insured, and at what premium, and whether such premium was the usual rate for such insurance, in what company or companies such insurance was effected, to whom and by whom the premium was paid or agreed to be paid, whether to an officer or authorized agent of such company, how you knew him to be such officer or agent, where such company or companies have their principal place of business, at what date the premiums were paid, and how long such insurance was to run, and whether the premium or premiums so paid or agreed to be paid were included in the amount of the two drafts hereinafter mentioned.

6th do. If you did any such work, supplied any materials or expended any money for or on account of said bark at such time, in compliance with such request, state under what agreement, arrangement or terms, if any, you did so, and with whom such agreement, arrangement, or terms were made, and if it was reduced to writing; if such writing is in your possession annex a copy thereof to these cross-interrogatories.

7th do. If, in your answer to the seventh interrogatory, you state that there was unusual delay in performing the work on or expediting the departure of the bark Woodland, state why such delay occurred, if by the fault or neglect of any one. If so, by whose fault or neglect, and what means you have of knowing that there was such delay, and what was the cause of such delay?

8th do. If in reply to the eighth interrogatory, you answer that you received two drafts drawn by Captain Titus, of the bark

Woodland, on Messrs. Turnbull & Co., St. John's, N. B., both dated January 25th, 1871, and for \$2,000 gold, and \$2,606.24 gold, respectively, state whether you did not accept such drafts in lieu of your claim against the bark Woodland, her freight and cargo?

9th do. Unless at the time you accepted said two drafts you were entirely satisfied with the responsibility of the drawers alone, and unless at such time you agreed to release the ship, freight, and cargo from any lien for your alleged services and expenditures on her and their behalf, and to look only to the drawees for payment, why did you accept the drafts, and why did you not, when the Woodland was at St. Thomas with her cargo, then and there satisfy your claim against the bark and her cargo, and why did you permit her and her cargo to leave St. Thomas without paying your claim?

10th do. If you answer the 9th interrogatory affirmatively, state how and what means you have of knowing that the annexed are exact copies of the said drafts, whether they have been carefully compared by you with the original drafts, and if they include all the writings and indorsements on said original drafts. State what omissions or additions, if any, have been made in the copy hereunto annexed.

11th do. If the drafts were delivered to J. H. Fechtenburg & Co., were they not transferred to them, in whole or in part, for an antecedent debt; if so, what was the amount of such antecedent debt; at 42 the time of such transfer, if any was made, was any money then actually paid to you, or credit given to you or your firm by J. H. Fechtenburg? If so, state how much, and whether it was credit or money.

12th do. And state whether the money or credit was not agreed to be given to you or your firm at some future time and on the happening of some contingency. If so, state when and how much was to be paid or given to you or your firm, and in what manner and in what contingency, and if the contingency has yet happened?

13th do. State particularly what means you have of knowing every and all the matter you may testify to in response to the last interrogatory?

Lastly. Do you know of anything concerning the matters in question that may tend to the benefit or advantage of the claimants above named? If yea, state the same as fully as if you had been particularly interrogated concerning the same.

CROSS INTERROGATORIES FOR THE EXAMINATION OF J. A. LOVEN-GREEN.

First cross-interrogatory. When and how were you made acquainted with the condition of the bark Woodland when she arrived at St. Thomas, in November, 1870? Did you, at such time, see or examine the bark, and what means you had of knowing what her condition was?

43 2d do. State what means, if any, you have of knowing that anything was done to the Woodland at St. Thomas in the winter of 1870-'71 to refit her for sea?

3d do. Was the letter from Turnbull & Co. to John H. Titus, master of the bark Woodland, shown you? If so, was there any authority in such letter to authorize Captain Titus to both draw on Turnbull & Co. for money to make repairs, or to pay for repairs when made, and, at the same time, to suffer liens for such repairs to be created or continued on the bark or her cargo? If so, insert, in answer to this cross interrogatory, the extracts from said letter which you think gave such authority.

4th do. Did not that letter, on the contrary, direct him, either expressly or by implication, to raise money either from G. W. Smith & Co or by draft on Turnbull & Co., so as to pay for repairs when made, and thus avoid the expense of respondentia and bottomry bonds, or other maritime liens, or to raise money for the purpose of discharging any lien which might have been created on the Woodland or her cargo?

5th do. How much, if anything, did you actually pay for said two drafts?

6th do. Are the copies annexed true copies of the original drafts with the endorsements thereon? If not, state the omissions or additions in the copies annexed.

44 7th do. At whose request were the words "recoverable against the vessel, freight, and cargo" annexed to said drafts, and state precisely when, and in what stage of the negotiation for sale of the drafts, those words were added, and state whether it was not after the drafts had been bought by, delivered to, and become the property of J. Niles & Co.?

8th do. Have you not, directly or indirectly, sold, assigned, and delivered, or entered into a binding contract to sell, assign, or deliver the said two drafts to Messrs. Whitmore & Co., or order, or to some other person or persons?

9th do. If you answer the eighth cross-interrogatory in the negative, why, then, was the following endorsement made on the drafts: "Pay Messrs. Whitmore & Co., or order, value in account. St. Thomas, 28th January, 1871. J. H. Fechtenburg & Co."?

10th do. At the time of such transfer, if any was made, was any money then actually paid, or credit given by you to J. Niles & Co., or other person, in consideration for such transfer? If so, state how much; whether it was credit or money, and to whom it was given.

11th do. And state whether the money or credit was not agreed to be given to you at some future time, and on the happening of some contingency? If so, state when and how much was to be paid or given to you, and in what manner, and in what contingency, and if the contingency has happened.

45 12th do. State particularly what means you have of knowing every and all the matter you may testify to in response to the last interrogatory.

Lastly. Do you know of anything concerning the matters in question that may tend to the benefit or advantage of the claimants above named? If yea, state the same fully, as if you had been particularly interrogated concerning the same.

CROSS-INTERROGATORIES FOR EXAMINATION OF SUCH OTHER WITNESSES AS MAY BE PRODUCED ON BEHALF OF LIBELLANTS.

1. How long have you resided in your present residence, and been engaged in your present occupation, and what has been your previous residence and occupation?

2. Where were you during the time the Woodland was at St. Thomas? How long did she remain there? State what means you have of knowing that she arrived there, or in what condition she arrived, or that she was then in need of repairs, or that any repairs had been done to her, or in what manner and at what cost they were done.

3. State particularly what means you have of knowing all or any of the matters inquired into in the third interrogatory?

4. State particularly what means you had of knowing any of the matters you may testify as to, in answer to the last interrogatory.

46 Lastly, Do you know of anything concerning the matters in question that may tend to the benefit or advantage of the claimants above named? If yea, state the same as fully as if you had been particularly interrogated concerning the same.

No. 1. Exchange for \$2,000, gold. St. Thomas, West Indies, 25th January, 1871.

At ten days after sight, pay this third of exchange (first and second unpaid) to the order of Messrs. J. Niles & Co., two thousand dollars American gold coin, No. 393, payable in New York, value received, which place to account of disbursements of bark Woodland and cargo at this port, and recoverable against the vessel, freight, and cargo.

J. H. TITUS, *Master*.

To Messrs. TURNBULL & Co.,

St. John, N. B.

(On the margin :) J. Niles & Co.

(Endorsed:)

Pay Messrs. J. H. Fechtenburg & Co. or order, value received.
St. Thomas, 25th January, '71.

J. NILES & CO.

Pay Messrs. Whitmore & Co. or order, value in account.
St. Thomas, 27th January, '71.

J. H. FECHTENBURG & CO.

No. 2. Exchange for \$2,606.24, gold. St. Thomas, West Indies, 25th January, 1871.

At ten days after sight, pay this third of exchange (first and second unpaid) to the order of Messrs. J. Niles & Co., two thousand six hundred and six dollars twenty-four cents American gold coin, payable in New York, value received, which place to account of disbursements of bark Woodland and cargo at this port, and recoverable against the vessel, freight, and cargo.

J. H. TITUS, *Master*.

To Messrs. TURNBULL & Co.,

St. John, N. B.

(On the margin :) J. Niles & Co.

(Endorsed:)

Pay Messrs. J. H. Fechtenburg & Co. or order, value received.
St. Thomas, 25th January, '71.

J. NILES & CO.

Pay Messrs. Whitmore & Co. or order, value in account.
St. Thomas, 28th January, '71.

J. H. FECHTENBURG & CO.

ST. THOMAS, 8th Nov., 1871.

At the request of Messrs. J. H. Fechtenburg & Co., the undersigned, U. S. vice-consul, this day examined the cash-book and ledger of said firm, and found that the bills of exchange, copies of which are hereunto annexed, were duly paid for by them to Messrs. J. Niles & Co. at the request of Capt. Titus, of the bark Woodland. I also examined Messrs. J. Niles & Co.'s account with Messrs. J. H. Fechtenburg & Co., and found that the said firm of J. Niles & Co. were not at that time indebted

to Messrs. J. H. Fechtenburg & Co., and, further, that in my opinion the whole transaction on the part of Messrs. J. H. Fechtenburg & Co. was done in good faith; and, also, that the drafts were purchased at a discount of $2\frac{1}{2}$ per cent., say two and one-half per cent.

48 Given under my hand and seal of office date above written.

[L. S.]

E. B. SIMMONS,
U. S. Vice-Consul.

U. S. district court.

J. H. FECHTENBURG ET AL.

vs.

THE BARK WOODLAND, HER TACKLE, APPAR-
el, &c.

We hereby admit that the annexed are true copies of the original drafts or bills of exchange, drawn by Capt. J. H. Titus, master of the bark Woodland, upon Messrs. Turnbull & Co., owners of said vessel, mentioned and referred to in this cause, and do consent that the same be read upon the trial of this cause, in lieu of said originals, with the same force and effect as if said originals were produced, proved, and read.

New York, January 22d, 1873.

SCUDDER & CARTER,
Proctors for Claimants.

Deposition of witnesses produced, sworn, and examined the 13th day of February, in the year one thousand eight hundred and seventy-three, at St. Thomas, West Indies, under and by virtue of a commission issued out of the district court of the United States for the southern district of New York, in a certain cause therein depending
49 and at issue, wherein J. H. Fechtenburg et al. are libellants, vs. The Bark Woodland, her tackle, apparel, &c., and freight and cargo, as follows:

J. A. LOVENGREEN, of St. Thomas, West Indies, aged thirty-three years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the libellants, doth depose and say as follows:

First. To the first interrogatory he saith: My name is J. A. Lovengreen; aged thirty-three; occupation, merchant; reside at St. Thomas.

Second. To the second interrogatory he saith: The firm of J. A. Fechtenburg & Co. was composed of J. H. Fechtenburg and myself.

Third. To the third interrogatory he saith: Knew of the arrival of the bark Woodland in November, 1870. Am unable to state anything in regard to repairs done to said bark.

Fourth. To the fourth interrogatory he saith: Mr. J. Niles, partner of the firm of J. Niles & Co., of this place, offered some time in the month of January, 1871, to sell my firm drafts, to be drawn by Captain J. H. Titus on Messrs. Turnbull & Co., of St. Johns, New Brunswick, to the extent of four thousand six hundred and six twenty-four one hundredths dollars, gold, against disbursements of British bark Woodland and cargo, at this port.

50 Fifth. To the fifth interrogatory he saith: Said J. Niles, in proposing to sell to my firm drafts to the aforementioned amount, showed me a letter signed Turnbull & Co., St. Johns, New Brunswick, addressed to Captain J. H. Titus, of British bark Woodland, con-

taining the following paragraph authorizing him to draw drafts on them, the said Turnbull & Co., for the purpose of obtaining his funds cheaply: "As soon as Heney & Parker heard of the disaster, they wrote you to draw on them for funds to pay for your repairs, and sent letters to G. W. Smith & Co. to show their standing. *With these we doubt not you will be able to obtain your funds cheaply, and thereby avoid the great expense of a bottomry, or, if it could be done,*" (this portion not underlined or in italics in original) better draw on us, either payable here or at New York, in gold."

Sixth. To the sixth interrogatory he saith: No; inasmuch as we were unacquainted with the standing of Messrs. Turnbull & Co., I refused to purchase from Mr. J. Niles the proposed drafts, unless Captain J. H. Titus would bind on them as collateral the vessel, her freight and cargo.

Seventh. To the seventh interrogatory he saith: The remarks inserted in said drafts by Capt. J. H. Titus, as requested by me, made them quite satisfactory. I had no interview with Capt. Titus in reference thereto, and treated only with Mr. J. Niles.

Eighth. To the eighth interrogatory he saith: Yes; the drafts in question were purchased and received in the name and for the account of my firm, J. H. Fechtenburg & Co., from J. Niles & Co. The annexed are copies of said drafts or bills of exchange, and were bought by my firm at two and one-half per cent. discount, and the money paid to J. Niles & Co.

Ninth. To the ninth interrogatory he saith: Said drafts were
51 purchased in good faith, relying upon the authorization contained in said letter of Turnbull & Co. to Captain J. H. Titus. According to the best of my knowledge, money borrowed on a bottomry or a responsia bond can rarely be obtained at a less premium than twenty to twenty-five per cent., and is consequently a more expensive method of obtaining funds than by the sale of drafts. Said drafts would most decidedly not have been purchased by my firm if the remarks "recoverable against the vessel, freight and cargo" had not been inserted.

Tenth. To the tenth interrogatory he saith: No; Messrs. J. Niles & Co. were not indebted to us; said drafts were bought by my firm at two and one-half per cent. discount, and we paid Messrs. J. Niles & Co. the amount less the said discount in cash, and my firm, J. H. Fechtenburg & Co., are still the legal owners and holders of said two drafts, and they were only endorsed by my firm to Messrs. Witmore & Co. for matter of convenience in collection; and the said drafts were not, nor are they now, the property of Messrs. Whitmore & Co., which will be seen from the endorsement on said drafts, which reads, value in account.

Lastly. To this interrogatory he saith: No; nothing more.

J. A. LOVENGREEN.

ANSWERS TO CROSS-INTERROGATORIES.

First. To the first cross-interrogatory he saith: Am unable to state any particulars as regards the condition of the bark Woodland on her arrival at this port.

52 Second. To the second cross-interrogatory he saith: I was one of the surveyors on the damaged cargo, and know that the bark discharged her cargo, and I saw the bark repairing.

Third. To the third cross-interrogatory he saith: The letter from Messrs. Turnbull & Co., of St. John, N. B., to John H. Titus, was shown to me, and I only read the paragraph in which Messrs. Turnbull & Co. authorized Captain J. H. Titus to draw on them, in St. John, N. B., or

New York, payable in gold, or on Messrs. Heney & Parker, of New York, for amount of disbursements of bark Woodland.

Fourth. To the fourth cross-interrogatory he saith: In the letter from Messrs. Turnbull & Co. to Capt. Titus I only read one paragraph, which related as to how Captain Titus should raise his funds, and that paragraph did not state that G. W. Smith & Co. would advance funds, but simply that letters were sent to show the standing of Heney & Parker, and authorized Captain Titus to draw on Turnbull & Co., either payable in St. John, N. B., or in New York, in gold, for the amount of his disbursements.

Fifth. To the fifth cross-interrogatory he saith: My firm, J. H. Fechtenburg & Co., paid the amount of the drafts less two and one-half per cent. discount.

Sixth. To the sixth cross-interrogatory he saith: They are true copies.

53 Seventh. To the seventh cross interrogatory he saith: When Mr. J. Niles came to me and proposed to sell me drafts to the extent of four thousand six hundred and six $\frac{24}{100}$ dollars, gold, the drafts were not yet drawn. I then informed him that I was not acquainted with the standing of Turnbull & Co., and *[would not buy them at all, unless the captain would bind in them, as collateral, the vessel, her freight and cargo]* (not underlined or in italics in original), to which he agreed.

Eighth. To the eighth cross-interrogatory he saith: No; I have not.

Ninth. To the ninth cross-interrogatory he saith: The indorsation was placed on the drafts to enable Messrs. Whitmore & Co. to collect for us, and consequently only as a matter of convenience.

Tenth. To the tenth cross-interrogatory he saith: As stated before, on the receipt of the drafts, my firm paid Messrs. J. Niles & Co. for them, the amounts in cash, less two and one-half per cent. discount, and as we then became the owners of said drafts we sent them to Messrs. Whitmore & Co. for collection.

Eleventh. To the eleventh cross-interrogatory he saith: In buying the drafts, my firm made no arrangements with any one. As I replied, in answer to the tenth cross-interrogatory, my firm bought the drafts in good faith, paid Messrs. J. Niles & Co. for them, and then sent them to New York for collection. It was fully understood that the amounts were recoverable against vessel, freight, and cargo.

54 Twelfth. To the twelfth cross-interrogatory he saith: As the drafts were bought by me for my firm, I am competent to confirm my answer to eleventh cross-interrogatory.

Lastly. To this cross interrogatory he saith: I know nothing more.

J. A. LOVENGREEN.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 13th day of February, 1873, before

CONRAD C. SIMMONS,
Commissioner.

"As soon as Heney & Parker heard of the disaster, they wrote you to draw on them for funds to pay for your repairs, and sent letters to G. W. Smith & Co. to show their standing. With these we doubt not you will be able to obtain your funds cheaply, and thereby avoid the great expense of a bottomry; or, if it could be done better, draw on us, either payable here or in New York (in gold)."

Above is extract from Turnbull & Co.'s letter to Capt. Titus.

J. A. LOVENGREEN.

At the execution of a commission for the examination of witnesses, wherein J. H. Fechtenburg et al. are libellants, vs. the bark Woodland, her tackle, apparel, &c., and freight, and cargo, this paper writing, being an extract from a letter signed Turnbull & Co., St. John, N. B., was produced and shown to Mr. J. A. Lovengreen, and by him deposed to at the time of his examination before

CONRAD C. SIMMONS,
Commissioner.

55 No. 1. Exchange for \$2,000 gold, St. Thomas, W. I., 25th January, 1871.

At ten days after sight, pay this third of exchange (first and second unpaid) to the order of Messrs. J. Niles & Co., two thousand dollars, American gold coin, payable in New York, value received, which place to account of disbursements of bark Woodland and cargo, at this port, and recoverable against the vessel, freight, and cargo.

J. H. TITUS, *Master.*

To Messrs. TURNBULL & Co.,
St. John, N. B.

(In margin :) J. Niles & Co.

(Endorsed :)

— Pay Messrs. J. H. Fechtenburg & Co., or order, value received. St. Thomas, 25th January, '71.

J. NILES & CO.

Pay Messrs. Whitmore & Co., or order, value in account. St. Thomas, 27th January, '71.

J. H. FECHTENBURG & CO.

No. 2. Exchange for \$2,606.24, gold, St. Thomas, W. I., 25th January, 1871.

At ten days after sight, pay this third of exchange (first and second unpaid) to the order of Messrs. J. Niles & Co., two thousand six hundred and six dollars twenty-four cents, American gold coin, payable in New York, value received, which place to account of disbursements of bark Woodland and cargo, at this port, and recoverable against the vessel, freight, and cargo.

J. H. TITUS, *Master.*

56 To Messrs. TURNBULL & Co.,
Saint John, N. B.

(In margin :) J. Niles & Co.

(Endorsed :)

Pay Messrs. J. H. Fechtenburg & Co., or order, value received. St. Thomas, 25th January, '71.

J. NILES & CO.

Pay Messrs. Whitmore & Co., or order, value in account. St. Thomas, 28th January, '71.

J. H. FECHTENBURG & CO.

At the execution of a commission for the examination of witnesses wherein J. H. Fechtenburg et al. are libellants, vs. The bark Woodland, her tackle, apparel, &c., and freight and cargo, the two drafts annexed,

for \$2,000 and \$2,606.24, were received by me from J. A. Lovengreen, partner of the firm of J. H. Fechtenburg & Co., and by him deposed unto at the time of his examination before

CONRAD C. SIMMONS,

Commissioner.

Deposition of J. Niles.

First. To the first interrogatory he saith: Name, Johannes Niles; age, forty-five years; occupation, commission merchant and ship-agent; residence, Island of St. Thomas, D. W. I.

Second. To the second interrogatory he saith: Yes, I was; and my said firm has been engaged in that business about fourteen years. My experience in the business extends over the entire period that I have been occupied therein.

57 Third. To the third interrogatory he saith: Yes, she did arrive here at that time from Montevideo, laden with dry ox and cow hides, bales unshorn sheep skins, bales horse hair and shin bones; said vessel arrived here in a disabled state, namely, leaking badly, spars and yards sprung, rigging parted, windlass badly damaged, etc., etc.

Fourth. To the fourth interrogatory he saith: My firm attended to the business [*Capt. Titus having tendered to me said vessel's business, in compliance, as he stated, with instructions that had been given to him by Turnbull & Co.*] (not underlined or in italics in the original), the Woodland's managing owners, in the event of his having to call at this port, and I accordingly accepted same.

Fifth. To the fifth interrogatory he saith: As before stated, the bark Woodland having arrived at this port in a disabled condition, her cargo was discharged and stored here, at the recommendation of competent surveyors, duly appointed, in order to ascertain the full extent of the damage sustained, as also for the purpose of effecting the necessary repairs; said vessel was afterwards taken on the marine repairing slip here, and the metal was stripped from her bottom. Her bottom, as also her topsides, having been found very open, were thoroughly recaulked, the damaged spars, yards, and rigging were either replaced by new or repaired, and according to the report of competent surveyors, duly appointed, all was done that was necessary for placing the vessel in seaworthy condition, to proceed upon her intended voyage and earn freight and passage money. The portion of the cargo that was found badly damaged by sea-water was sold here by public auction, at the

58 recommendation of duly appointed surveyors, and the other portion thereof was reshipped at this port, on board of the said bark Woodland, for conveyance to New York, its original port of destination.

Sixth. To the sixth interrogatory he saith: All that was done here to vessel and cargo was by the recommendation of competent surveyors duly appointed.

Seventh. To the seventh interrogatory he saith: About two months. There was no unusual or unnecessary delay in performing the work or expediting the departure of the Woodland from this port.

Eighth. To the eighth interrogatory he saith: For balance of indebtedness to my firm, for services rendered and expenses incurred for the bark Woodland and her cargo, after deducting the net proceeds of the damaged portion of the cargo sold at auction, we received Captain Titus' three drafts or bills of exchange on Turnbull & Co., of St. John, N. B., payable in New York, in gold, namely, for two thousand dollars, two thousand six hundred and six dollars and twenty four cents, and

fifteen hundred dollars. The last mentioned amount was returned to Captain Titus, in accordance with agreement, for benefit of owners.

Ninth. To the ninth interrogatory he saith: The annexed are copies of two of the aforementioned drafts or bills of exchange received by my firm from Captain Titus and sold by us to Messrs. J. H. Fechtenburg & Co.

Tenth. To the tenth interrogatory he saith: Yes; there was 59 such an agreement between Captain Titus and myself, prior to my accepting his drafts; said agreement was made after having failed to obtain the required funds through the firm of G. W. Smith & Co. The mode agreed upon for raising the required funds was by bottomry and respondentia on vessel and cargo. This was, however, not adopted, in consequence of my having afterwards, conditionally, consented to accept Captain Titus' drafts on Turnbull & Co.

Eleventh. To the eleventh interrogatory he saith: The change above mentioned was made out of deference to the intimation contained in Turnbull & Co.'s letter, in regard to the great expense of a bottomry, as per following extract: "As soon as Heney & Parker heard of the disaster, they wrote you to draw on them for funds to pay for your repairs, and sent letters to G. W. Smith & Co. to show their standing. With these, we doubt not, you will be able to obtain your funds cheaply, and thereby avoid the great expense of a bottomry; or, if it could be done better, draw on us, either payable here or in New York, in gold." As already intimated, after having had an interview with the managing partner of G. W. Smith & Co., Mr. E. B. Simmons, respecting the credit alluded to in Turnbull & Co.'s letter, and as he declined to afford the facility on the strength of the letter, I further conferred with Captain Titus, and it was agreed upon, in the first instance, that he would raise the necessary funds by bottomry and respondentia bond on vessel, freight, and cargo. I finally, however, as already stated, conditionally agreed to accept Captain Titus' drafts on Turnbull & Co.

Twelfth. To the twelfth interrogatory he saith: After I had conditionally agreed to take Captain Titus' drafts as aforesaid, I offered them for sale to Messrs. J. H. Fechtenburg & Co., showing, at 60 same time, Mr. Lovengreen, the managing partner of said firm, the paragraph in Turnbull & Co.'s letter, authorizing masters to draw on them. After Mr. Lovengreen had read the paragraph, he replied to me that *[he was not acquainted with the standing of Turnbull & Co., therefore, must decline to purchase the proposed drafts, unless Captain Titus would, in drawing the intended drafts, make them recoverable against vessel, freight, and cargo, which was agreed to, and done by Captain Titus in drawing the drafts.]* (Not underlined or in italics in the original.)

Thirteenth. To the thirteenth interrogatory he saith: Finding I could dispose of the said drafts with the *[collateral security]* (not underlined or in italics in the original) demanded and agreed to, as already stated, said drafts were then drawn out, and Captain Titus affixed his signature to them. Drafts were by far a less expensive method to owners of securing the payment of the money due to my firm than by a bottomry and respondentia bond.

Fourteenth. To the fourteenth interrogatory he saith: No; my firm was not indebted to Messrs. J. H. Fechtenburg & Co. I endorsed and sold said two drafts to Messrs. J. H. Fechtenburg & Co. at two and one-half per cent. discount, for which they paid me.

Lastly. To this interrogatory he saith: At present I can recollect nothing more of importance.

J. NILES.

First. To the first cross-interrogatory he saith ; Yes ; I am at present the sole member of the firm ; about fourteen years.

Second. To the second cross-interrogatory he saith : Immediately on arrival went on board the bark Woodland and there learnt her condition [*from the master*]. (Not underlined or in italics in the original.)

Third. To the third cross interrogatory he saith : By information from the master, confirmed by the pumping of the vessel, which went on during my stay on board.

Fourth. To the fourth cross interrogatory he saith : The master having placed the vessel's business in my hands, all that was furnished in cash or materials, as also the work that was done for account of bark Woodland and her cargo, were done and furnished at the recommendation of competent surveyors duly appointed [*with the approbation of the master*]. (Not interlined or in italics in the original.)

Fifth. To the fifth cross-interrogatory he saith : All the charges appearing in the accounts were mentioned to Captain Titus and agreed to by him upon our accepting the vessel's business, and same are all included in the drafts, including the one for fifteen hundred dollars that was returned to Captain Titus for the benefit of the owners of bark Woodland as per agreement.

62 Sixth. To the sixth cross-interrogatory he saith : All agreements, arrangements or terms were made [*verbally with Captain Titus*]. (Not underlined or in the original.)

Seventh. To the seventh cross-interrogatory he saith : There was no unusual or unnecessary delay, the work was carried through as expeditiously as the facilities afforded here allowed.

Eighth. To the eighth cross-interrogatory he saith : No ; I did not accept said drafts in lieu of my claim.

Ninth. To the ninth cross-interrogatory he saith : We were from the first unwilling to accept master's drafts on vessel's owners ; master therefore decided to raise the required funds by bottomry and respondentia bonds ; afterwards, finding that by master or drawer making said drafts recoverable against vessel, freight, or cargo we could dispose of them on the spot, finally accepted same.

Tenth. To the tenth cross-interrogatory he saith : The copies of the drafts appended have been compared by me with the thirds produced by the commissioner and found true and genuine.

Eleventh. To the eleventh cross-interrogatory he saith : Neither myself personally nor my firm was indebted to Messrs. J. H. Fechtenburg & Co. at the time they purchased these drafts from me. We received from them the amounts of the drafts in cash less two and one-half per cent. discount.

63 Twelfth. To the twelfth cross-interrogatory he saith : As already stated, the drafts were paid for by Messrs. J. H. Fechtenburg & Co. in cash on delivery, and there was no special agreement entered into with them in reference thereto.

Thirteenth. To the thirteenth cross-interrogatory he saith : The knowledge derived from my having personally negotiated said drafts.

Lastly. To this cross-interrogatory he saith : No.

J. NILES.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 13th day of February, 1873, before

CONRAD C. SIMMONS,

Commissioner.

"As soon as Heney & Parker heard of the disaster they wrote you to draw on them for funds to pay for your repairs and sent letters to G. W. Smith & Co. to show their standing. With these we doubt not you will be able to obtain your funds cheaply and thereby avoid the great expense of a bottomry, or, if it could be done better, draw on us either payable here or in New York (in gold)."

Above is extract from Turnbull & Co.'s letter to Capt. Titus.

J. NILES.

At the execution of a commission for the examination of witnesses wherein J. H. Fechtenburg et al. are libellants vs. The Bark Woodland, her tackle, apparel, &c., and freight and cargo, this paper writing being an extract from a letter signed Turnbull & Co., St. John, N. B.,
64 was produced and shown to Mr. J. Niles, and by him deposed to at the time of his examination before,

CONRAD C. SIMMONS,

Commissioner.

At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms in the city of New York, on the ninth day of April, in the year of our Lord one thousand eight hundred and seventy-three.

Present, the honorable Samuel Blatchford, district judge.

J. H. FECHTENBURG ET AL.

vs.

THE BARK WOODLAND, HER TACKLE, AP
parel, &c. } Order.

On reading and filing the annexed consent of James Ridgway, proctor of the libellants, and of Scudder and Carter, proctors for the claimants herein, and on motion of Scudder and Carter, proctors for the claimants herein, it is hereby ordered and decreed that the commission heretofore issued herein to Conrad C. Simmons, esquire, at St. Thomas, West Indies, be returned to said commissioner with the interrogatories thereunto annexed for the re-examination of J. Niles, named in said commission, upon the fifth, sixth, eleventh, twelfth, and thirteenth direct interrogatories, and the additional redirect interrogatories, and fourth and
65 fifth cross interrogatories, together with three additional cross-interrogatories (numbered fourteen, fifteen, and sixteen), for the further cross-examination of said J. Niles, and for the re-examination of J. A. Lovengreen, named in said commission, upon the third and fourth direct interrogatories, and that the said J. Niles and J. A. Lovengreen answer fully, specifically, and in detail all the subjects upon which they may be interrogated in said above-named direct and redirect cross and additional cross-interrogatories.

SAML. BLATCHFORD.

We hereby consent to the entry of the above order.

Dated New York, Mar. 19, 1873.

SCUDDER & CARTER,

Claimant's Proctors.

JAMES RIDGWAY,

Proctor for Libellants.

U. S. district court, southern district of New York.

J. H. FECHTENBURG ET AL. }
vs.
 THE BARK WOODLAND, &C. }

Additional cross interrogatory for the examination of J. Niles.

Cross-interrogatory number 14: Attach to your cross-interrogatories a copy of your account in detail in the above matter against the said bark Woodland, her cargo and freight, for charges and expenses made and incurred on their behalf in the winter of 1870 and 1871.

Do. No. 15. Did you not receive some commission or commissions from one or all of the parties you employed on the amount of their bills; if you did, state in detail the rate and amount of commissions in each case, and the names of the parties from whom you received commissions and the names of the persons to whom said bills were paid?

No. 16. Have you not paid or agreed to pay to Captain Titus, of the bark Woodland, or to some person for his benefit, any commission or commissions on the amount of or money for the repairs made to said bark Woodland, or for the expenses incurred on behalf of her cargo while at St. Thomas, West Indies, in the winter of 1870 and 1871; if so, state in detail for what the money or commission was paid, or who paid, and how much you so paid or agreed to pay, and whether it has been paid, and if not, why not?

SCUDDER & CARTER,
Proctors for Clmts.

U. S. district court, southern district New York.

J. H. FECHTENBURG ET AL. }
vs.
 THE BARK WOODLAND, HER TACKEL, APPAREL,
 &c., and cargo and freight. }

67 REDIRECT INTERROGATORY FOR THE EXAMINATION OF J. NILES.

State whether or not the bills for charges and expences of bark Woodland and cargo were submitted to Capt. Titus, her master, and whether or not and to what extent he examined and approved the same as correct.

JAMES RIDGWAY,
Proctor for Libellants.

RE-EXAMINATION OF MR. J. A. LOVENGREEN.

J. A. LOVENGREEN, merchant, of St. Thomas, aged 33 years and upwards, being duly and publicly sworn pursuant to the directions herein annexed and examined on the part of the libellants, doth depose and say as follows:

Third. To the third direct interrogatory he saith:

I knew of the arrival of the Brit. bark Woodland [*in distress*] (not underlined or in italics in the original) in November, 1870. Am unable to state anything in regard to repairs done to said vessel.

Fourth. To the fourth direct interrogatory he saith:

I repeat that Mr. J. Niles, partner of the firm of J. Niles & Co., of this place, offered some time in the month of January, 1871, to sell my firm drafts to be drawn by Captain J. H. Titus on [*Messrs. Turnbull & Co., of St. John, N. B., owners of the British bark Woodland,*] (not underlined or in italics in the original) to the extent of \$4,606.24, say 68 four thousand six hundred and six 24-100 dollars gold, [*against disbursements of Brit. bark Woodland and cargo at this port.*] (Not underlined or in italics in the original.)

J. A. LOVENGREEN.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this seventh day of May, 1873, before

CONRAD C. SIMMONS,
Commissioner.

STATEMENT.

I, Conrad C. Simmons, commissioner to examine certain parties in the cause of Messrs. J. H. Fechtenburg & Co. et al. vs. the bark Woodland, her tackle, apparel, &c., and freight and cargo, do hereby certify that I have called upon J. Niles in order to interrogate him, and he has answered each time that he cannot do it as he is too busy and has not time. I therefore, at the request of Mr. J. Lovengreen, of the firm of J. H. Fechtenburg & Co., return the commission, the interrogatories to Mr. Niles being unanswered.

St. Thomas, 13 May, 1873.

CONRAD C. SIMMONS,
Commissioner.

United States district court, southern district of New York.

J. H. FECHTENBURG ET AL.

vs.

THE BARK WOODLAND, HER TACKLE, APPAREL,
&c.

69 The commission issued in the above-entitled cause, on the part of the libellants, to Conrad C. Simmons, esquire, at St. Thomas, West Indies, having been returned by him without being fully executed; and the same having been sent back to said commissioner by an order of this court, with certain instructions; and the same having been thereafter returned by said commissioner, the interrogatories to J. Niles being unanswered:

We do hereby consent that said commission be sent back to said commissioner, under an order of this court, with instructions that he comply with said former order of this court, in reference to the re-examination and further examination of said J. Niles.

New York, July 14th, 1873.

SCUDDER & CARTER,
Proctors for Claimants.
JAMES RIDGWAY,
Proctor for Libellants.

At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Tuesday, the fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-three.

Present, the Honorable Samuel Blatchford, district judge.

J. H. FECHTENBURG ET AL.

vs.

THE BARK WOODLAND, HER TACKLE, &C.

} Order.

70 On reading and filing the annexed consent of James Ridgway, proctor of the libellants, and of Scudder & Carter, proctors for the claimants herein, and on motion of James Ridgway, proctor for the libellants herein, it is hereby ordered and decreed that the commission herein on the part of the libellants to Conrad C. Simmons, esquire, at St. Thomas, West Indies, be sent back to said commissioner, and that he comply with the former order of this court in reference to the re-examination and further examination of J. Niles, as set forth in said order, on the return of said commission.

SAMUEL BLATCHFORD.

RE-EXAMINATION OF J. NILES.

Fifth. To the fifth direct interrogatory he saith : Said bark Woodland was in need of advances for repairs, supplies, disbursements, and charges. In order to ascertain the extent of her damage to hull, and to have the necessary repairs effected, said vessel's cargo was discharged and stored on shore, after which she was taken on the "marine repairing slip" here, where the metal was stripped from off her bottom, and her bottom and top-sides were thoroughly recaulked, &c., the damaged spars, yards, rigging, &c., were either replaced by new, or repaired; all said repairs and outfits were material and necessary for said bark Woodland, to enable her to proceed with safety on her intended voyage, and earn freight and passage money. With regard to said vessel's cargo while in the warehouse, pending her repairs, a portion thereof, that was found badly damaged by sea-water, was, at the recommendation of the surveyors appointed, sold at public auction; the sound portion was subsequently reshipped on board of said vessel for conveyance to New York.

71 Sixth. To the sixth direct interrogatory he saith : All that was done to said vessel and cargo at this port was done by the authority of Captain Titus, with the concurrent recommendation of the surveyors appointed.

Eleventh. To the eleventh direct interrogatory he saith : The change in the mode of payment was made in consequence of Captain Titus having shown to me a letter received by him from Messrs. Turnbull & Co., the owners of the bark Woodland, containing the following paragraph, viz : "As soon as Heney & Parker heard of the disaster they wrote you to draw on them for funds to pay for your repairs, and sent letters to G. W. Smith & Co. to show their standing. With these we doubt not you will be able to obtain your funds cheaply, and thereby avoid the great expense of a bottomry, or, if it could be done better, draw on us, either payable here or in New York in gold." After having had an interview with the managing partner of the firm of Messrs. G. W. Smith & Co.—Mr. E. B. Simmons—respecting the credit alluded to in Turnbull & Co.'s letter, and finding that he declined to afford the facility on the strength of the letter above adverted to, I then conferred with Captain Titus in reference to the dilemma which said refusal placed him in, whereupon he, Captain Titus, at first decided to raise the necessary funds by a bottomry and respondentia bond on vessel, freight, and cargo; he, how-

ever, afterwards said to me he would prefer to give drafts on Turnbull & Co. for the balance due to my firm, and urged me to accept same; nothing, however, was definitely agreed to or done between myself and Captain Titus in regard to obtaining the necessary funds at the present interview.

Twelfth. To the twelfth direct interrogatory he saith :

Having at length agreed, conditionally, to take the drafts that Captain Titus proposed to draw on Turnbull & Co. for the balance due to my firm, I next offered for sale \$4,606.24 of said proposed drafts to Messrs. J. H. Fechtenburg & Co., for the purpose of taking up the money thereon, for the repairs, supplies, disbursements, and charges, for the purposes of said bark Woodland. I, at the same time, presented to Mr. J. A. Lovengreen, the managing partner of Messrs. J. H. Fechtenburg & Co., the letter of Turnbull & Co. to Captain Titus, containing their authorization. Mr. Lovengreen, after having read the paragraph in said letter quoted, in answer to eleventh direct interrogatory, replied to me that as he was *[not acquainted with the standing of Turnbull & Co. he declined to purchase the proposed drafts, unless Captain Titus would, in drawing same, embody therein a clause granting a lien on the vessel, her freight, and cargo, abiding the payment of said drafts; this I communicated to Captain Titus, who at once agreed thereto,]* (not underlined or in italics the original), and he accordingly drew the drafts, making them recoverable against the vessel, freight, and cargo, namely : two drafts for respectively \$2,000 and \$2,606.24, which I sold to Messrs. J. H. Fechtenburg & Co., and I took up the money thereon for the repairs, supplies, disbursements, and charges, for the purposes of said bark Woodland ; also a third draft for \$1,500 to cover the balance due to my firm.

Thirteenth. To the thirteenth direct interrogatory he saith :
73 I accepted said drafts in consequence of the terms of said letter from Turnbull & Co. Drafts were by far a less expensive method of securing the payment of the money due to my firm, than by bottomry and respondentia bond.

Fourth. To the fourth cross interrogatory he saith : [*At the request of Capt. Titus and under his personal supervision*] (not underlined or in italics in the original) generally, I performed or caused to be performed work or services, furnished or procured materials, and expended monies, all for or on behalf of the barque Woodland or her cargo, while in this port in the winter of 1870 and 1871, as follows, viz : I attended to the discharge, storing and reshipping of the cargo, to the sale of the damaged portion of said cargo at auction, to the repairs, outfits and materials done and furnished to vessel, to the counting-room work, and to all the interior details.

I expended amount of said vessel's general bill, less the five per cent. commission charged thereon	\$216 27
Do. do. amount of her cash bill (less commission)	768 14
Do. do. amount of bill of expenses of cargo (less commission)	1,832 38
Do. do. This amount comprised in vouchers 4 to 13 inclusive, and two following items appearing in the acct. current (less commission) ..	2,582 93

Fifth. To the fifth cross-interrogatory he saith : I took the fire
74 risk in question for account of my firm at the rate of one per cent., which is rather below the average rate here for such risks : said risk was understood to run, [*and did run for the full time*] that said cargo remained on shore ; [*said bona-fide insurance was proposed by me,*

and agreed to by Capt. Titus, prior to the commencement of the risk] (not underlined or in italics in the original). I am unable, or rather feel at a loss to answer positively, whether the premium is, or may be considered as specially included in the two particular drafts mentioned; all I can with certainty say in respect thereto is that the gross amount of said premium formed an integral part of the amount of indebtedness to my firm on account of the barque Woodland and her cargo.

Fourteenth. To the fourteenth cross-interrogatory he saith: Vide attached copies of our accounts.

Fifteenth. To the fifteenth cross-interrogatory he saith: I received no such commission, to the best of my recollection.

Sixteenth. To the sixteenth cross-interrogatory he saith: According to proposal made by Capt. Titus in [*behalf of the Woodland owners*] (not underlined or in italics in the original), I returned to him a share of the commissions that accrued from said vessel's business amounting to \$1,500 gold, in his draft at 10 days on Turnbull & Co., bearing date 25th January, 1871, amount of which draft, together with those purchased by Messrs. J. H. Fechtenburg & Co., comprised the balance due to my firm on account of barque Woodland and her cargo.

75

REDIRECT INTERROGATORY.

To the redirect interrogatory he saith: The bills for charges and expenses of barque Woodland and cargo were all submitted to Capt. Titus, her master, and they were examined by him in my presence item by item, and he approved the same as correct.

J. NILES.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this thirteenth day of August, 1873, before

CONRAD C. SIMMONS,
Commissioner.

British bark Woodland and owners, or whom it may concern, in account with J. Niles & Co.

GENERAL BILL.

To paid 20 lbs. coffee, \$4; 4 lbs. butter, \$2.....	\$6 00
“ 1 lb. pepper, 25 c.; 5 bars soap, \$1.20.....	1 45
“ 4 bot. pickles, \$2; 2 bot. salt, 50 c.....	2 50
“ 3 gals. kerosene oil, \$2.10; 4 lbs. black tea, \$2.40.....	4 50
“ medicines, \$21.13; towage, \$32.....	53 13
“ 2 bbls. potatoes, \$5.50; 1 ham, \$3.50.....	9 00
“ pilotage, \$8.50; water, \$9.20.....	17 70
“ 1 tierce beef, 28; salt, 20 c.....	28 20
“ 1 broom, 40 c.; 2 gals. vinegar, \$1.....	1 40
“ rep'ring water c'sks, \$3; 1½ t'ns coal, \$12.....	15 00
“ 8 mast hoops, \$2.80; 2 mar. spike, \$1.....	3 80
“ 16 iron rivets and birds.....	32
“ blacksmith repairing blocks.....	1 30
76 “ labor mooring ship, &c.....	14 00
“ 25 lbs. beans, \$2.50; 25 lbs. peas, \$2.....	4 50
“ ¼ box raisins, \$1; 25 lbs. rice, \$1.50.....	2 50
“ 2 bbls. flour, 18; 10 lbs. tobacco, \$5.....	23 00

To paid 1 keg butter, \$8.96; $\frac{1}{2}$ doz. pumpkins, \$1.25.....	10 21
" 4 bbls. bread.....	17 76
	<hr/>
	216 27
5 per cent. comm. on above disbursements.....	10 81
	<hr/>
	227 08

E. & O. E.

St. Thomas, 21st January, 1871.

J. NILES & CO.

Correct.

J. H. TITUS.

*British bark Woodland and owners, or whom it may concern, in account
with J. Niles & Co.*

EXPENSES ON CARGO.

To paid labor on board and ashore, landing and re-		
shipping cargo, including stevedore.....	1,076 63	
" boat hire, taking off and returning with la-		
borers, &c.....	41 75	
" water for laborers.....	12 00	
" hire of a stage for wharf landing and reship-		
ping cargo.....	40 00	
" hire of lumber for flooring over the ware-		
house.....	36 00	
" hire for eight trucks, conveying cargo to		
and from warehouse.....	120 00	
77 " hire of a winch, discharging and reloading.	40 00	
" hire of ten cotton hooks, discharging and		
reloading bales.....	20 00	
" hire of falls, blocks and slings for ware-		
house	32 00	
" surveyors on damaged cargo	48 00	
" wharfage landing and reshipping about		
500 tons cargo.....	350 00	
" King's physician examining cargo and		
certificate prohibiting the landing of		
same in town.....	16 00	
	<hr/>	1,832 38
To 5 per cent. com. on above disbursements.....	91 63	
To $2\frac{1}{2}$ per cent. com. on receiving, storing and reship-		
ping cargo, including damaged portion sold at auc-		
tion, valued at \$125,000.....	3,125	
To 2 % storage on above valuation.....	2,500	
To 1 % fire insurance on valuation.....	1,250	
	<hr/>	6,966 63
		<hr/>
		8,789 01

E. & O. E.

St. Thomas, 21st Jan'y, 1871.

Correct.

J. H. TITUS.

J. NILES & CO.

British bark Woodland and owners, or whom it may concern, in account with J. Niles & Co.

CASH BILLS.

To cash paid Captain J. H. Titus for himself and crew.....	\$768 14
5 per cent. comm. on above disbursements.....	38 41
	<hr/> \$806 55

E. & O. E.

St. Thomas, 21st January, 1871.

J. NILES & CO.

J. H. TITUS.

78 *Dr. British Bark Woodland and owners, or whom it may concern, in account with J. Niles & Co.*

Voucher 1. J. Niles & Co.'s bill of gen'l expenses....	\$227 08	
" 2. Ditto's bill of cash advances.....	806 55	
" 3. Ditto's bill of expenses on cargo.....	8,799 01	
	<hr/>	9,832 64
" 4. Ship-carpenter's bill	1,187 58	
" 5. Marine Rep. Slip Co.'s bill.....	641 20	
" 6. Marine asylum's bill.....	77	
" 7. Butcher's bill.....	78 85	
" 8. Dr. Errickson's bill for medical attendance	48	
" 9. Printer's bill.....	10	
" 10. C. Bishop's bill for rating chron.....	2	
" 11. British consul's bill.....	86 75	
" 12. G. W. Smith & Co.'s bill of sundries....	240 32	
" 13. Custom-house bill for dues \$134.38, paid fees \$2.85.....	137 23	
Paid for 1st, 2d, and final surveys.....	64	
Paid postage.....	10	
	<hr/>	\$2,582 93

79 To 5 per cent. com'n on above amounts from vouchers No. 4 to 13 inclusive.....	129 15	
	<hr/>	\$2,712 08
		<hr/> \$12,544 72

E. & O. E.

St. Thomas, January 25th, 1871.

J. NILES & CO.

Correct.

J. H. TITUS.

CR.

By proceeds of auction sale.....	\$7,055 50	
5 per cent. com. on \$7,055.50.....	352 78	
Government fees & on sale.....	20	372 78
	<hr/>	<hr/> \$6,682 72

By Capt. J. H. Titus' d'fts on Messrs. Turnbull & Co., payable in New York for respectively \$2,000, \$1,500, and \$2,606.24 at 10 days.....	6, 106 24
Less 2½ per cent. disc't.....	152 65
1½ per cent. for endorsing and negotiating.	91 59 244 24
	<hr/> 5, 862
	<hr/> \$12, 544 72

U. S. district court.

J. H. FECHTENBURG ET AL.
vs.
 THE BARK WOODLAND, HER TACKLE, APPAREL,
 &c. }

80 We hereby consent that the commission issued in the above-entitled cause, and now in the hands of the clerk of this court, be opened.

New York, August 21st, 1873.

JAMES RIDGWAY,
Proctor for Lib.
 SCUDDER & CARTER,
Proctors for Claimants.

At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Friday the twenty-second day of August, in the year of our Lord one thousand eight hundred and seventy-three.

Present, the honorable Samuel Blatchford, district judge.

J. H. FECHTENBURG ET AL.
vs.
 THE BARK WOODLAND, HER TACKLE, APPAREL,
 &c. }

On reading and filing consent signed by the proctors for the respective parties, on motion of James Ridgway, proctor for libellants, it is ordered that the commission in the above-entitled cause be opened and filed.

SAMUEL BLATCHFORD.

Via Halifax.]

SAINT JOHNS, N. B., Dec. 24, 1870.

Capt. JOHN H. TITUS,
Bark Woodland, St. Thomas.

81 DEAR SIR: On the 20th inst. we rec'd a letter signed by you under date of 2d inst. Previous to this we had learned by tel. from New York that you had "put into" St. Thomas leaky. This morning we rec'd a letter from J. Niles & Co., dated 13th inst. These letters abound in generalities, and are marked by an absence of definiteness that to us is rather painful. You say you arrived in a leaky and disabled condition; that vessel was "making seven inches of water per hour," and that you feared the W. would require a great deal done to her before she would be considered in a sea-worthy condition to reload

her cargo, and that you should therefore like to have our views on the subject. With such meagre information as the above before us, how did you think we could send you any any advice that would be of value? Niles' letter is nearly as bad. Among other things he says: "her top is all adrift." For pity sake, what are we to understand by this? He gives an extract from the first survey, from which it would appear nothing is really very serious, and from which we would not suppose the following language could be properly employed, namely, "to do the repairs recommended here will require a very heavy outlay, and we hardly think we would recommend Capt. Titus to undertake these repairs here."

Something, however, may be much more serious than we have yet been apprised of. The last part of Messrs. Niles' remarks above we do not know how to understand; that is, whether they are intended to mean that the vessel is to be condemned or sent from St. Thomas under temporary repairs to some place where permanent repairs can be made more cheaply.

The vessel and freight are but partly insured; but whether insured or not, you have simply to do your duty. We may say to you, however, that unless vessel is much worse than would appear
82 from the vague information furnished us, you would not be justified in having her condemned. Should she be improperly condemned we could not recover a penny of our insurance. The underwriters talk of sending on their agents, and will certainly do so unless they think everything has been fairly and properly done. On the other hand, should it cost more to repair than the vessel would be worth when done (she is valued in policies at \$10,000) we would have trouble at least in collecting. As we are so entirely ignorant of the real facts of the case, we can give no positive advice in regard to the foregoing. It seems to us almost as if you were out of the world, the communication is so tedious. On receipt of Messrs. Niles' letter this morning we were greatly alarmed, and we telegraphed to Heney & Parker, New York, as follows: "Send following instructions to Titus, quickest manner, cable or otherwise, namely, make only such repairs as will bring vessel and cargo to New York, hiring extra hands." Otherwise proceed to St. John under temporary repairs, reshipping cargo another vessel.

This explains itself; of course, if you have to reship the cargo in another vessel, you will procure as low freight as possible, as the W. will receive the difference between what she was to receive as per B. L., and what you may have to pay from St. Thomas to New York. You will also have to retain a lien upon the cargo for its contribution towards the gen'l av'g' expenses. As soon as Heney & Parker heard of the disaster, they wrote you to draw on them for funds to pay for your repairs, and sent letters to G. W. Smith & Co. to show their standing. With these we doubt not you will be able to obtain your funds cheaply, and thereby avoid the great expense of a bottomry, or if it could be done better draw on us, either payable here or in New York, (in gold).

83 We will merely add that we hope you will use your best judgment and your best exertions for the interest of "all concerned," and inasmuch as you must have friends to advise and assist you, endeavor to select those who are honest and honorable, and have nothing to do with men who would counsel fraud, as too many are disposed to do when they think they have an opportunity to make money out of underwriters.

Hoping to hear a more favorable account from you in your next, we are, very truly yours,

TURNBULL & CO.

(On the envelope in writing:) "Halifax, (2 six-cent stamps).
Capt. John H. Titus, bark Woodland, care Messrs. J. Niles & Co., St. Thomas, West Indies."

(On face of envelope—stamped:) "St. John, N. B. De. 26, '70."

(On back of envelope—stamped:) "Turnbull & Co. Dec. 24, 1870.
Saint John, N. B." H., De. 27, 1870, N. S. St. Thomas, R. Jua' 11, '71."

CITY, COUNTY, AND STATE OF NEW YORK, ss:

I, the undersigned, a public notary in and for the State of New York, residing in Brooklyn, appointed for the county of Kings, do hereby certify that the foregoing copy, letter, and endorsements on the envelope is a true and correct copy of an original letter and endorsements on the envelope to me this day shown and by me, with said original, carefully compared.

Witness my hand and seal this 22d day of June, 1872.

[L. S.]

WM. D. JONES,
Notary Public for Kings Co

U. S. district court.

J. H. FECHTENBURG ET AL.

vs.

THE BARK WOODLAND, HER TACKLE, APPAR-
el, &c.

We hereby admit that the annexed is a true copy of the original letter written and sent by Messrs. Turnbull & Co. to Capt. J. H. Titus, (then at St. Thomas), and upon which Capt. Titus drew the two drafts mentioned and referred to in this cause, and consent that the same be read upon the trial of this cause, in lieu of said original, with the same force and effect as if said original was produced, proved, and read.

New York, January 22d, 1873.

SCUDDER & CARTER,
Proctors for Claimants.

The President of the United States of America to Conrad C. Simmons, of Saint Thomas, West Indies, greeting:

85 Know ye that we, in confidence of your prudence and fidelity, have appointed you commissioner, and by these presents do give you full power and authority diligently to examine, upon their corporal oaths or affirmations, before you to be taken, and upon the interrogatories and cross-interrogatories hereunto annexed, and and , who surveyed the cargo of the bark Woodland, at said St. Thomas, in the winter of 1870, and 1871, as witnesses on the part of the claimants in a certain cause now pending undetermined in the district court of the United States of America, for the southern district of New York, wherein J. H. Fechtenburg et al., are libellants, vs. the bark Woodland, her tackle, apparel, &c., and freight and cargo. And we hereby require you, before whom such testimony may be taken, to reduce the same to writing, and to close it up, under your hand and seal, directed

to George F. Betts, esq., clerk of the district court of the United States, for the southern district of New York, at the city of New York, as soon as may be convenient after the execution of this commission, and that you return the same, when executed as above directed, with the title of the cause endorsed on the envelope of the commission.

Witness the honorable Samuel Blatchford, judge of the district court of the United States, for the southern district of New York, at the city of New York, this 9th day of April, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-seventh.

[L. S.]

GEORGE F. BETTS,

*Clerk of the District Court of the United States,
for the Southern District of New York.*

SCUDDER & CARTER,
Proctors' Claimants.

86

Instructions to Commissioners.

Annexed to the first commission forwarded herewith is an extract from the statutes of the State of New York relative to the taking of testimony out of the State, which extract is directed by law to be annexed to the commission; but, as it does not comprise everything necessary to be attended to by the commissioners, they are requested to observe the following more ample

INSTRUCTIONS:

I. All the commissioners named in the commission should have notice of the time and place of executing it, and if any of them do not act, let the fact that they were notified, or could not be notified, and the reasons for their not acting, be stated.

II. The commission must be executed by the commissioner named therein.

III. The acting commissioner will examine the witnesses separately, after publicly administering the following oath or affirmation:

"You do swear that the answers which shall be given by you to the interrogatories proposed to you shall be the truth, the whole truth, and nothing but the truth. So help you God."

The oath shall be administered (except in cases hereinafter mentioned) by the witness laying his hand upon and kissing the Gospels.

But if the witness shall desire it he shall be permitted to swear in the following form: "You do swear in the presence of the ever living God," and while so swearing he may or may not hold up his hand, in his discretion.

87 Or if the witness shall declare that he has conscientious scruples against taking an oath, or swearing in any form, he shall be permitted to make his affirmation in the following form: "You do solemnly, sincerely, and truly declare and affirm," omitting the words, "So help you God."

IV. The general style or title of the depositions must be drawn up in the following manner:

"Deposition of witnesses, produced, sworn or (affirmed), and examined the day of , in the year one thousand eight hundred and , at , under and by virtue of a commission issued out of the district court of the United States for the southern district of New York in a

certain cause therein depending and at issue wherein J. H. Fechtenburg et al. are libellants vs. the bark Woodland, her tackle, apparel, &c., and freight and cargo as follows:

A. B., of (insert his place of residence and occupation) aged years and upwards, being duly and publicly sworn (or affirmed) pursuant to the directions hereto annexed, and examined on the part of the claimants, doth depose and say as follows: First. To the first interrogatory, he saith, &c. [Insert the witness's answer.] Second. To the second interrogatory, he saith, &c., and so on throughout,

If he cannot answer, let him say that he knoweth not.

V. If there be any cross-interrogatories, the witness will go on thus:

First. To the first cross interrogatory he saith, &c., and so on throughout.

VI. When the witness has finished his deposition, let him subscribe it, and the acting commissioner will certify as follows:

88 Examination taken, reduced to writing, and by the witness subscribed and sworn to this day of , 18 , before

"Commissioner."

VII. If any papers or exhibits are produced and proved, they must be annexed to the depositions in which they are referred to and be subscribed by the witness, and be endorsed by the acting commissioners, in this manner:

"At the execution of a commission for the examination of witnesses, wherein J. H. Fechtenburg et al. are libellants vs. the bark Woodland, her tackle, apparel, &c., and freight and cargo;

"This paper writing was produced and shown to (insert the witness's name) and by him deposed unto at the time of his examination before—

"Commissioners."

VIII. The acting commissioners will sign their names to each half sheet of the depositions and exhibits.

IX. If an interpreter is employed, one of the commissioners will administer to him the following oath, and certify thereto.

"You do solemnly swear that you will truly and faithfully interpret the oath and interrogatories to be administered to , a witness now to be examined, out of the English language into the language, and that you will truly and faithfully interpret the answers of the said thereto, out of the into the English language."

89 Let the depositions be subscribed by the interpreter as well as by witness, and certified by the acting commissioners as follows:

Examination taken, reduced to writing, subscribed by the witness and by the sworn interpreter, and sworn to by the witness this day of , 18 , before—

Commissioner.

X. The commissioner will make return on the back of the commission by endorsement, thus:

"The execution of this commission appears in certain schedules hereunto annexed.

"Commissioner."

XI. The depositions and exhibits (if any) must be annexed to the commission, and then the commission, the directions, the interrogatories,

cross-interrogatories, depositions, and exhibits, must be folded into a packet and bound with tape. The acting commissioners are to set their seal at the several meetings or crossings of the tape, endorse their names on the outside, and direct it thus: "U. S. district court, southern district of New York. J. H. Fechtensburg et al. vs. The bark Woodland, her tackle, apparel, &c. To George F. Betts, esquire, clerk of the district court of the United States for the southern district of New York, at the city of New York."

90 XII. When the commission is thus executed, made up and directed, it must be returned in the manner specified in the direction of the commission, if there be any.

XIII. If there be no direction on the commission specifying the manner in which it is to be returned, then it must either be delivered to the court by one of the acting commissioners personally, or else be forwarded by some persons coming to this place, and who must be liable, on his arrival, to make oath before one of the judges or the clerk of the court:

"That he received the same from the hands of A. B., one of the commissioners, and that it had not been opened or altered since he so received it."

XIV. In case of returning the commission by mail, it is to be deposited by one of the acting commissioners in the nearest post-office, he making the following endorsement thereon:

"Deposited in the post-office at _____, this _____ day of _____, 18 _____, by me.

"Commissioner."

In case of returning the commission by a vessel, it is to be deposited by one of the acting commissioners in the letter bag of such vessel, he making upon the commission the following endorsement:

"Deposited in the letter bag of the _____, now lying at _____, and bound for the port of New York, this _____ day of _____, 18 _____, by me.

"Commissioner."

The commissioners are requested to be very careful to observe the foregoing instructions, as the smallest variance may vitiate the execution of the commission.

91 If the commission be returned by an agent, let him be instructed to call, on his arrival at this place, upon Messrs. Scudder & Carter, proctors for claimants, number 66 Wall st., city of New York, U. S. A., who will direct him as to its delivery.

At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms in the city of New York on Wednesday, the ninth day of April, in the year of our Lord one thousand eight hundred and seventy-three.

Present, the honorable Samuel Blatchford, district judge.

J. H. FECHTENBURG ET AL.	}	Order.
vs.		
THE BARK WOODLAND, HER TACKLE, &C.		

On reading and filing the annexed consent of James Ridgway, esq., proctor for the libellants herein, and on motion of Scudder & Carter, proctors for the claimants herein, it is hereby ordered and decreed that

a commission issue out of this court directed to Conrad C. Simmons, esquire, at St. Thomas, West Indies, for the examination upon interrogatories and cross-interrogatories to be annexed to said commission of such persons as may be produced before him, and who were the parties who acted as surveyors of the cargo of the said bark Woodland at St. Thomas aforesaid, in the winter of 1870 and 1871.

SAMUEL BLATCHFORD.

92 We hereby consent to the entering of the within order.
Dated New York, April 9th, 1873.

JAMES RIDGWAY,
Pr. for Lib.
SCUDDER & CARTER,
Proctors for Claimants.

U. S. district court, southern district of New York.

J. H. FECHTENBURG ET AL. }
vs. }
THE BARK WOODLAND, &C. }

Interrogatories to be administered at St. Thomas, West Indies, to V. S. Richardson and J. A. Lovengreen and , who surveyed the cargo of the bark Woodland at said St. Thomas in the winter of 1870 and 1871.

1st. State your name, age, occupation, and residence, and how long you have been engaged in your present occupation.

2d. In the winter of 1870 and 1871 did you act as surveyor of the cargo of the bark Woodland at St. Thomas, West Indies; if so, who appointed you?

3d. Were you the only one appointed such surveyor, or were other parties co-surveyors of said cargo with you? If so, state the name or names of such co-surveyor or surveyors.

93 4th. Did you and all your co-surveyors, if there were any other than yourself, thoroughly inspect and examine the said cargo and its condition, so as to satisfy yourself or yourselves of the value of said cargo?

5th. At what value was the said cargo appraised by you and your co-surveyors, if you had any co-surveyors?

6th. If there were more than two surveyors, was the estimate of value of said cargo agreed to by all or only by a majority of the surveyors; state how many surveyors agreed to the estimate.

7th. If there was a dispute or disagreement as to value of cargo, state at what value each appraiser estimated the cargo?

8th. State how you arrived at the estimate of the value of said cargo?

9th. In forming the estimate of said cargo, did you name its value at St. Thomas or elsewhere; if elsewhere, at what place or places? Did you estimate the value of the cargo as if it were new or in its condition at time of survey, or its probable value at the ports of destination?

10th. Was there any market for such a cargo as this in St. Thomas, except the same would be purchased there with a view to send elsewhere; if so, to what port would the same be sent with reference to value.

Lastly. Do you know of anything concerning the matters in question that may tend to the benefit or advantage of the claimants above

94 named? If yea, state the same as fully as if you had been particularly interrogated concerning the same.

SCUDDER & CARTER,
Proctors for Claimants.

U. S. district court, southern district of New York.

J. H. FECHTENBURG ET AL.

vs.
THE BARK WOODLAND, HER TACKLE, APPAR-
el, &c.

Cross-interrogatories to be administered at St. Thomas, West Indies, to
and and , who surveyed the cargo of the bark
Woodland at said St. Thomas in the winter of 1870 and 1871.

First cross-interrogatory. If, in answer to the fifth interrogatory, you say that the said cargo was appraised by you, state, as near as you can, the precise time (and whether or not it was before the close of the year 1870) at which the charges for storage, &c., of such cargo were incurred, in which such appraisement was based; and state also whether the market value of such goods advanced or declined shortly after December, 1870; and from what cause, if you are aware of the same.

95 Lastly. Do you know any other matter or thing which may tend to the benefit or advantage of Messrs. J. H. Fechtenburg & Co., the libellants? If yea, state the same as fully as if you had been particularly interrogated concerning the same.

JAMES RIDGWAY,
Pr. for Lib'ls.

Deposition of witnesses produced, sworn, and examined, this seventh day of May, in the year one thousand eight hundred seventy-three, at St. Thomas, under and by virtue of a commission issued out of the district court of the United States for the southern district of New York, in a certain cause therein depending and at issue, wherein J. H. Fechtenburg et al. are libellants, vs. the Bark Woodland, her tackle, apparel, &c., and freight and cargo, as follows:

J. A. LOVENGREEN, merchant, of St. Thomas, aged 33 years and upwards, being duly and publicly sworn, pursuant to the directions herein annexed, and examined on the part of the claimants, doth depose and say as follows:

First. To the first interrogatory, he saith:

My name is J. A. Lovengreen, age thirty three, occupation merchant. I reside at St. Thomas, and have been engaged in my present occupation since the year 1867.

Second. To the second interrogatory, he saith: I did act [*as surveyor on the damaged cargo*] (word "damaged" only interlined in original) of the Brit. bark Woodland, at St. Thomas, in the winter of 1870 and 1871. [*I was appointed by the British consul.*] (Not interlined in original.)

96 Third. To the third interrogatory, he saith: No, I was not the only surveyor appointed; Mr. Van Speyk Richardson was appointed co-surveyor with me on the damaged cargo of the British bark Woodland.

Fourth. To the fourth interrogatory, he saith: We only examined that part of the cargo which was damaged, in order to state what had best be done with it for the interest of all concerned.

Fifth. To the fifth interrogatory, he saith: We did not value the cargo of the British bark Woodland.

Sixth. To the sixth interrogatory, he saith: As I answered to the fifth interrogatory, the surveyors did not estimate the value of the cargo of the British bark Woodland.

Seventh. To the seventh interrogatory, he saith: We did not estimate the value of said cargo.

Eighth. To the eighth interrogatory, he saith: I repeat my answer to the seventh interrogatory.

Ninth. To the ninth interrogatory, he saith: I repeat my answer to seventh interrogatory.

Tenth. To the tenth interrogatory, he saith: If sold at St. Thomas, the cargo would only be bought as a speculation for shipment elsewhere. Impossible to state where it would have been sent.

Lastly. To this interrogatory, he saith: I would state that 97 the damaged portion of the cargo, which was sold here, was re-shipped, and the parties shipping it suffered a [loss of about \$4,000.] (Not underlined or in italics in original.)

When the damaged portion of the cargo came to be shipped, it was found that many of the bales were entirely worthless, and had to be left behind, and were afterwards thrown away.

First. To the first cross-interrogatory, he saith: The cargo of the British bark Woodland was not appraised by us, the surveyors; I understand that the cargo was valued in accordance with New York price currents of the latter part of the year 1870; the market value of such goods declined considerably in the beginning of the year 1871; I do not know the exact cause of the decline, but suppose that the alteration of the duty on the 1st January, 1871 affected the value of such goods.

Lastly. To this cross-interrogatory, he saith: I consider that it was to the benefit of the owners of the cargo that the damaged portion was sold here [as they then saved the loss which the parties buying and shipping it sustained]. (Not underlined or in italics in the original.)

J. A. LOVENGREEN.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 7th day of May, 1873, before.

CONRAD C. SIMMONS,

Commissioner.

Van Speyk Richardson, merchant of St. Thomas, aged 40 years and upwards, being duly sworn pursuant to the directions herein annexed and examined on the part of the claimants, doth depose and say as follows:

First. To the first interrogatory, he saith: My name is Van Speyk Richardson, aged 40 years, occupation merchant; reside at St. 98 Thomas, and have been engaged in my present occupation about thirteen years.

Second. To the second interrogatory, he saith: I did act as surveyor on the portion of cargo damaged; Mr. Niles requested me to act; the warrant came from the [British consul]. (Not underlined or in italics in original.)

Third. To the third interrogatory, he saith: Mr. Lovengreen was appointed with me as co-surveyor.

Fourth. To the fourth interrogatory, he saith: We were not appointed to estimate the value of the cargo, but to examine and report on the damaged portion such as was submitted to us; we examined it as thoroughly as circumstances would allow, and from this examination we concluded it was badly damaged.

Fifth. To the fifth interrogatory, he saith: We were not appointed for the purpose of putting any estimate on the cargo.

Sixth. To the sixth interrogatory, he saith: Both of us agreed to the condemnation of the part which was submitted to us as damaged.

Seventh. To the seventh interrogatory, he saith: There was no estimate by us and no dispute.

Eighth. To the eighth interrogatory, he saith: We did not estimate the value of the cargo, as we were not appointed for that purpose.

99 Ninth. To the ninth interrogatory, he saith: We did not name the value of the cargo, either at St. Thomas or elsewhere, as we were only appointed to examine and report upon the damaged portion submitted to us.

Tenth. To the tenth interrogatory, he saith: There was no market in St. Thomas for this article; the damaged portion of sheep skins sold here, consisting of ninety-six bales, was bought by me and shipped to Boston. After I made the purchase, I became aware that the duty would be largely enhanced on the 1st of January, 1871, and I tried to get it to that market before that time, but being unsuccessful (the vessel arriving in Boston only in January), I lost very considerably on the shipment. The shipping expenses on the ninety-six bales sheep skins which I bought, namely, the expense of conveying them from the store in which they were stored, to the vessel, was about \$22.60.

Lastly. To this interrogatory, he saith: I believe that Messrs. J. H. Fechtenburg & Co. became honestly possessed of the drafts for disbursements of Bark Woodland by purchasing same for cash, and which, in my opinion, they were only induced to do, after seeing a letter of credit given for that purpose.

First. To the first cross-interrogatory, he saith: The damaged portion of the sheep skins was surveyed by us on or about the 9th to the 10th day Dec., '70. No charges for storage or commission of any kind could be based on our survey report, as we were never appointed to appraise. At the time we recommended the condemnation, we were not aware of the conditions of insurance.

100 Lastly. To this cross-interrogatory, he saith: Messrs. J. H. Fechtenburg & Co., with whom I have had large transactions, are, in my opinion, of the highest respectability and integrity, and they have acted in good faith in all they have done in this matter.

V. S. RICHARDSON.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this 7th day of May, 1873, before

CONRAD C. SIMMONS,

Commissioner.

No. 3. Exchange for \$1,500 gold, St. Thomas W. I., January 25th, 1871.

At ten days after sight pay this first of exchange (second and third unpaid) to the order of Messrs. J. Niles & Co., one thousand five hundred dollars, American gold coin, payable in New York, value received, which place to account of disbursements of bark Woodland and cargo, at this port, and recoverable against the vessel, freight and cargo.

J. H. TITUS, *Master.*

To Messrs. TURNBULL & Co.,
St. John, N. B.

(In margin:) J. Niles & Co.

(Endorsed:) J. Niles & Co.

101

Name of vessel.	Date of entry.	Names of consignees or owners.	Description of property.	Amount or value on which duties were paid.	Duties.
Bark Woodland.	1871 February 20	Napier & Co.....	4,615 dry hides.....	\$17,469 00	\$1,746 96
	" " 17	C. Durand.....	1,000 " ".....	3,893 00	389 30
	" " "	N. D. Carlisle & Son.....	1,795 " ".....	5,872 00	687 20
	September " "	E. F. Davidson & Co.....	951 " ".....	4,053 00	405 30
	February 18	" " ".....	102 kip skins.....	212 00	21 20
	March 2	Austin Baldwin.....	Prepared meats.....	23 00	8 03
	" " "	Auffmordt & Co.....	Invoice missing.....		1,467 10
	March 10	Heney & Parker.....	Old metal.....	111 00	22 50
	" " "	E. F. Davidson & Co.....	109,740 shin-bones.....	697 00	4,747 55
	" " " " " " "	" " " " " " "	4 bales horse hair } 12 " " " " } 1 " " cow " }	5,031 00	Free.

I, Dudley F. Phelps, deputy collector of customs for the port of New York, certify that the foregoing is a true statement of the dutiable items of cargo of the bark Woodland, on her voyage to this port in February, 1871, and of the duties paid thereon, of the persons by whom duties were paid, of the amount or value on which such duties were paid.

Fees, 20 c.

I. A. B. L. S. G. M.

DUDLEY F. PHELPS,
Deputy Collector.

102 At a stated term of the district court of the United States of America for the southern district of New York, held at the City Hall, in the city of New York, on Saturday, the 31st day of January, in the year of our Lord one thousand eight hundred and seventy-four.

Present, the honorable Samuel Blatchford, district judge.

J. H. FECHTENBURG ET AL.

vs.

THE BARK WOODLAND, HER TACKLE, &C. }

This cause having been heard on the pleadings and proofs, and argued by the advocates for the respective parties, and due deliberation being had in the premises, it is now ordered, adjudged, and decreed by the court, that the libel filed in this action be, and the same is hereby, dismissed with costs to be taxed against the libellants. And the costs of the claimants having been taxed at the sum of one hundred and forty-two 15-100 dollars, it is further ordered, adjudged, and decreed that said claimants recover in this action against said libellants the said sum of one hundred and forty-two 15-100 dollars, being the amount of such taxed costs. And it is further ordered, that unless an appeal be taken from this decree within the time limited and prescribed by the rules and practice of this court, the stipulators for libellants' costs forthwith pay into court the amount of their stipulations, and that upon such

103 payment thereof the clerk distribute the proceeds in satisfaction of the costs as taxed herein.

SAMUEL BLATCHFORD.

REC. 334—4

U. S. District Court.

J. H. FECHTENBURG ET AL.

vs.

THE BARK WOODLAND, HER TACKLE, APPAR-
el, &c. }

Please take notice that the libellants hereby appeal to the circuit court of the United States for the southern district of New York, in the second circuit, from the final decree entered in the above entitled cause on the 31st day of January, 1874, dismissing the libel, with \$142.15 costs to the claimants and respondents.

New York, February 3d, 1874.

Yours, &c.,

JAMES RIDGWAY,

Proctor for Lib. and App'ls.

Messrs. SCUDDER & CARTER,

*Proctors for Cl'ts and Appellees.*GEORGE F. BETTS, *Esq.*, Clerk, &c.

J. H. FECHTENBURG ET AL.

vs.

THE BARK WOODLAND, HER TACKLE, AP-
parel, &c. }

104 Please take notice that Frederick Ansoategui and Edward D. Dennis, of No. 42 Broadway, merchants, will justify as sureties upon the bond or appeal in this cause, at the office of the clerk of this court, on the 5th day of February inst., at 11 o'clock a. m.

New York, February 3d, 1874.

Yours, &c.,

JAMES RIDGWAY,

Proctor for Lib. and App'ls.

Messrs. SCUDDER & CARTER,

Proctors for Cl'ts and Appellees.

We admit due service of a notice of which the above is a copy, and consent that the persons named be such sureties.

SCUDDER & CARTER,

Proctors for Claimants.

Know all men by these presents that we, J. H. Fechtenburg & Co., and Edward D. Dennis and Frederick Ansoategui, are held and firmly bound unto William W. Turnbull & others, claimants of the barque Woodland, her tackle, &c., in the sum of five hundred dollars, to be paid to the said William W. Turnbull and others, their executors, administrators, or assigns, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally firmly by these presents, sea'ed with our seals, and dated the 5th day of February, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas, J. H. Fechtenburg and J. A. Lovengreen, as appellants, have appealed to the circuit court of the United States for the
105 southern district of New York, in the second circuit, from a decree of the district court of the United States for the said southern district, bearing date the 31st day of January, 1874, in a suit in

which J. H. Fechtenburg and J. A. Lovengreen were libellants, against the barque Woodland, her tackle, apparel, &c.

Now, therefore, the condition of this obligation is such that if the above named appellants, J. H. Fechtenburg and J. A. Lovengreen, shall prosecute said appeal with effect any pay all costs which shall be awarded against them as such appellants therein if they shall fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

J. H. FECHTENBURG & Co., [L. s.]

By JAMES RIDGWAY,

Their Attorney.

EDW'D. D. DENNIS.

[L. s.]

F. ANSOATEGUI.

[L. s.]

Sealed and delivered and taken and acknowledged, this 5th day of February, 1874, before me,

GEORGE F. BETTS.

U. S. Commissioner.

UNITED STATES OF AMERICA,

Southern District of New York, ss :

Edward D. Dennis and Frederick Ansoategui, being duly sworn, do depose and say that he, the said Frederick Ansoategui, resides in the southern district of New York, and the said Edward D. Dennis resides in the eastern district of New York, and that they are each worth the sum of one thousand dollars over and above all their just debts and liabilities.

EDW'D D. DENNIS.

F. ANSOATEGUI.

Sworn to this 5th day of February, A. D. 1874, before me,

GEO. F. BETTS,

U. S. Commissioner.

106 This bond approved as to form and amount and sufficiency of surety.

Dated, New York, February 5, 1874.

SCUDDER & CARTER,

Proctors for Cl'm'ts.

Circuit court of the United States, southern district of New York,
second circuit.

J. H. FECHTENBURG AND J. A. LOVENGREEN, }
libellants' appellants,

vs.

THE BARK WOODLAND, HER TACKLE, APPAREL, }
&c., William W. Turnbull & Co., and others, }
claimant's appellees.

To the honorable the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

The petition of appeal of the above-named appellants respectfully sheweth that on or about the 2d day of March, 1871, the above-named libellants filed their libel in the district court of the United States, for the southern district of New York, against the said bark Woodland, her tackle, apparel, &c., in a cause of contract, civil and maritime, praying,

among other things, that the said court would pronounce for the claim in said libel set forth, and would condemn the said bark and freight, and all persons intervening for their interest therein, with costs, to which said libel these appellants pray leave to refer for its contents.

107 That on or about the 2d day of March, 1871, the said claimants filed their claim to the said bark, and executed the necessary stipulations for costs and value, according to the course and practice of said district court; and thereafter, on or about the 10th day of January, 1872, the said claimants of the said bark filed their answer to the said libel in the district court, praying that the said libel be dismissed, and the said libellants condemned in costs, as will more fully appear on reference to said answer, and to which, for the contents, these appellants pray leave to refer.

That thereafter the said cause came on to be heard before the honorable Samuel Blatchford, judge of the said district court, on the 3d and 4th days of December, 1873, upon the allegations and proofs adduced by the respective parties; and the said judge, having advised thereon, afterwards, on the 31st day of January, 1874, made a final decree or sentence in said cause, whereby it was adjudged that the said libel filed in said cause be dismissed, with costs, and that the said claimants recover of the said libellants the sum of \$142.15 costs as taxed, as will more fully appear by reference to said decree, to which reference is had for its contents.

And these appellants are advised and insist that the said decree is erroneous, inasmuch as said claimants were not entitled to have said libel dismissed, but said libellants were entitled to have a decree for the amount claimed by them, and set forth in said libel.

And these appellants, for these and other reasons, appeal from the whole and each and every part of said decree, to the next circuit court, to be held in said district, and upon the said appeal they intend to seek a new decision on the facts and on the law, on the pleadings and proofs, in the district court; and they pray that the said decree and every
108 part thereof may be reversed, or such other decree thereupon be made as to the said circuit court shall seem just, and that the said appellees may be condemned to pay to the libellants their claim set forth in their said libel, together with their costs in the premises. And these appellants will ever pray, &c.

New York, February 3d, 1874.

JAMES RIDGWAY,

Proctor for Libellants, Appellants.

We admit due service of a copy of the foregoing.

New York, Feb. 5, 1874.

SCUDDER & CARTER,

Proctors for Resp'dts.

U. S. district court.

J. H. FECHTENBURG AND J. A. LOVENGREEN, }
vs.
THE BRITISH BARQUE WOODLAND, HER }
tackle, &c.

BLATCHFORD, J.:

The libel in this case sets forth, in its first article, that this is an action founded upon contract, civil and maritime. It sets forth, in its second

article, that, in January, 1871, the British bark Woodland, being in the port of St. Thomas, in the West Indies, and standing in need of advances for repairs and supplies, disbursements and charges, J. Niles & Co., merchants in St. Thomas, advanced to the master of said vessel, for the purposes of said vessel, and on the credit of said vessel and owners, the sum of \$4,606.24, for which the said master drew his two certain drafts or bills of exchange upon the owners of said vessel, dated January 25th, 1871; one for \$2,000, in American gold coin, payable 10 days after sight, and one for \$2,606.24, in American gold coin, payable 10 days after sight, whereby he pledged the said vessel, freight and cargo for the payment of the same, and gave to whomsoever might be the holders of said drafts, a lien upon said vessel, freight and cargo; that said J. Niles & Co. took up said money, on said drafts of the libellants, and duly assigned to the libellants the said drafts, and said demand for repairs and supplies, disbursements and charges, and advances, and the lien therefor upon said barque, freight and cargo; and that the libellants advanced said money on the credit of said vessel and cargo and freight, and are owners of said lien. The third article of the libel sets forth that said advances, repairs, disbursements and charges were material and necessary for said vessel, without which she could not safely proceed upon her intended voyage, and earn freight and passage money; and that the whole amount of said advances, in American gold coin, is due and unpaid to the libellants. The fourth article of the libel sets forth that neither of said drafts has been accepted or paid, although duly presented to said owners; and that the libellants are the legal owners and holders thereof. The libel prays process against the vessel and freight.

The answer of the owners of the barque (being the same persons who were her owners at the time of the transactions set forth in the libel) denies the foregoing allegation of the first article of the libel. It admits that the barque was in the port of St. Thomas in January, 1871, and denies all the other allegations of the second article of the libel, except as afterwards admitted in the answer. It denies the allegations of the third article of the libel.

It admits that, while the barque was at St. Thomas, her master drew three drafts on her owners, and delivered them to the firm of J. Niles & Co. It denies that such drafts created any lien upon either vessel or cargo, and denies that J. Niles & Co. took up the money on said drafts of the libellants, or assigned to the libellants the drafts, or the alleged demand for repairs, supplies, disbursements, charges, or advances, or the alleged lien therefor, and denies that the alleged advances for which the drafts were given were made for the purposes of the vessel, or on her credit. It avers that a large portion of the alleged advances, if made at all, were made for the pretended purposes of the cargo of the vessel and on the credit of such cargo, and neither the vessel nor the freight is liable for the same; that this court has no jurisdiction over the case, and neither vessel nor cargo should be held responsible; that when the drafts were given the barque was on a voyage from Montevideo to New York with a cargo, and had put into St. Thomas for repair; that an agreement was made between the master of the barque and J. Niles & Co. by which the latter were to act as the agents of the vessel and her cargo, for which they were to receive a commission of 2½ per cent. upon the value of her cargo; that the cargo was also to be stored for 2 per cent. upon its value; that in the settlement of the accounts the cargo was valued at \$125,000, gold, and the percentage aforesaid was estimated upon that basis, and the drafts

drawn were made to include the percentage so arrived at; that in fact such valuation was greatly in excess of the true market value of such cargo, and was not worth to exceed \$80,000, gold, and the percentage aforesaid, if it should have been allowed at all, should have been estimated only upon the last-named sum; that another item going to make up the amount of said drafts was the sum of \$1,250, being 1 per cent.

upon such valuation, for fire insurance alleged to have been made
111 upon said cargo; that such fire insurance, if actually made, was illegal and unauthorized, and neither the cargo, nor its owners, nor the barque, nor her freight, nor their owners, should be held responsible therefor; that the amount of the foregoing overcharges and unauthorized alleged expenses, which have gone to make up such drafts, is \$3,275, gold, as to which amount neither the barque, nor her freight, is liable in any event; and that the said three drafts, and all the charges and disbursements, made in St. Thomas were made under a fraudulent agreement and conspiracy between the said master and the said J. Niles & Co. that the said charges were to be fraudulently increased, and that the said master and the said J. Niles & Co. were to share in such drafts or the proceeds thereof, and by reason of such fraud the said drafts were void and the said J. Niles & Co. and the libellants never had any lien on the vessel.

The barque was a British vessel, owned by persons residing at St. John, in New Brunswick. In November, 1870, while on a voyage from Montevideo to New York with a cargo she put into St. Thomas, a Danish port, in distress, leaking badly and needing repairs. The firm of J. Niles & Co. had been established there for 12 years as commission merchants and ship-agents. The master of the barque, Capt. Titus, applied to J. Niles & Co. to attend to the business of the vessel, stating that he had been instructed to do so by his owners in the event of his having to call at St. Thomas. J. Niles & Co. took charge of the vessel and cargo. The cargo was discharged and stored, in order to ascertain the full extent of the damage to the vessel, and to enable the repairs to be made. The vessel was taken out of water, the metal was stripped from her bottom, her bottom and her top sides were recaulked, her spars and rigging were renewed or repaired, and she was put into a sea-
112 worthy condition to proceed on her voyage with her cargo. Some of the cargo was found to be badly damaged by sea water, and was sold at public auction, and the rest was reshipped on the barque for New York. This occupied about two months. For the balance of the indebtedness claimed by J. Niles & Co. for services and expenses for the vessel and her cargo, after deducting the nett proceeds of the damaged part of the cargo that was sold at auction, J. Niles & Co. received from the master three drafts, drawn by him at St. Thomas, on the owners of the barque at St. John, New Brunswick (who are the present claimants of her), payable to the order of J. Niles & Co., in American gold coin, in New York, for the several sums of \$2,000, \$2,606.24, and \$1,500. The drafts were dated January 25th, 1871, and were payable ten days after sight, and each contained on its face the words "place to account of disbursements of barque Woodland and cargo, at this port, and recoverable against the vessel, freight, and cargo." The draft for \$1,500 was, as Mr. Niles testifies, "returned to Captain Titus, in accordance with agreement, for benefit of owners." J. Niles & Co. first endeavored, unsuccessfully, to obtain the necessary funds through the firm of G. W. Smith & Co., of St. Thomas. They then made an agreement with Captain Titus to raise the required funds by bottomry on the vessel and respondentia on the cargo. But that

was not carried out, because it was superseded by a conditional agreement by J. Niles & Co. to take drafts drawn by the master on the claimants. On the 24th of December, 1870, the claimants wrote from St. John a letter to Captain Titus, at St. Thomas, to the care of J. Niles & Co., which letter reached St. Thomas on the 11th of January, 1871. In that letter, after acknowledging the receipt of advices from the master and from J. Niles & Co., in reference to the disasters to the vessel, the

claimants say, "the vessel and freight are but partly insured, but, 113 whether insured or not [*you have simply to do your duty.*] (Not underlined or in italics in original.) We may say to you, however, that, unless the vessel is much worse than would appear from the vague information furnished us, you would not be justified in having her condemned. Should she be improperly condemned, we could not recover a penny of our insurance. The underwriters talk of sending out their agents, and will certainly do so unless they think everything has been fairly and properly done. On the other hand, should it cost more to repair than the vessel will be worth when done (she is valued in the policies at \$10,000,) we would have trouble, at least in collecting. [*As we are so entirely ignorant of the real facts of the case, we can give no positive advice*] (not underlined or in italics in original) in regard to the foregoing. It seems to us, almost, as if you were out of the world, the communication is so tedious. On receipt of Messrs. Niles' letter this morning, we were greatly alarmed, and we telegraphed to Heaney & Parker, New York, as follows: "Send following instructions to Titus, quickest manner, cable or otherwise, namely—make only such repairs as will bring vessel and cargo to New York, hiring extra hands; otherwise, proceed to St. John under temporary repair, reshipping cargo on other vessel." This explains itself. Of course, if you have to reship the cargo in another vessel, you will procure as low freight as possible, as the Woodland will receive the difference between what she was to pay as per bills of lading, and that you may have to pay from St. Thomas to New York. You will also have to retain a lien upon the cargo for its contribution towards the general average expenses. [As soon as Heaney & Parker heard of the disaster, they wrote you to draw on them for funds to pay for your repairs and sent letters to G. W. Smith & Co., to show their standing. With these, we doubt not you will be

114 able to obtain your funds cheaply, and thereby avoid the great expense of a bottomry; or, if it could be done better, draw on us, either payable here or in New York, in gold. [*We will merely add, that we hope you will use your best judgment, and your best exertions, for the interest of all concerned.*] (Not underlined or in italics in original.) G. W. Smith & Co. having declined to furnish the funds, and the agreement to provide them by bottomry and respondentia having been made, the letter from the claimants arrived, and, in consequence of their views expressed therein, the idea of bottomry was abandoned, and the conditional agreement to take drafts drawn on the claimants was made. To carry that out, J. Niles & Co. offered to sell the proposed drafts which were to be drawn, to the libellants, at the same time showing to them the passage in the said letter from the claimants, authorizing the master to draw on them, and referring to bottomry, being the passage above recited, embraced in brackets. After reading the passage, the libellants declined to purchase the drafts, on the ground that they were not acquainted with the standing of the claimants, unless the master would, in drawing the drafts, make them recoverable against vessel, freight, and cargo. This was agreed to by the master, and carried out. The libellants bought the two drafts mentioned in the libel, at $2\frac{1}{2}$ per cent.

discount, and paid for them in cash to J. Niles & Co. J. Niles & Co. endorsed the drafts in blank, and delivered them to the libellants. The money and materials furnished, and the work done, were furnished and done on the recommendation of surveyors, appointed with the approbation of the master, and by the authority of the master.

The account-current between J. Niles & Co. and the barque is dated St. Thomas, January 25th, 1871, and is certified on its face, by the master, to be correct. It includes, as debits, \$216.27, for various supplies furnished to the vessel by J. Niles & Co., and \$10.81

115 for commissions thereon to J. Niles & Co., at 5 per cent., \$768.14 for cash paid to the master, for himself and crew, by J. Niles & Co., and \$38.41 for commissions thereon to J. Niles & Co., at 5 per cent.; \$1,832.38 paid by J. Niles & Co. for expenses of landing and reshipping cargo, and surveying the damaged cargo, and \$91.63 for commissions thereon to J. Niles & Co., at 5 per cent.; sundry other bills, amounting to \$2,582.93, and \$129.15 for commissions thereon to J. Niles & Co., at 5 per cent. The total amount of the foregoing debits is \$5,669.72. There are also debited \$3,125.00 for commissions to J. Niles & Co., at 2½ per cent. for receiving, storing, and reshipping the cargo, including the damaged portion sold at auction, the whole cargo being valued at \$125,000 00, and \$2,500.00 for commissions to J. Niles & Co., at 2 per cent., for storage of the cargo on such valuation, and \$1,250.00 for fire insurance on the cargo, at 1 per cent. on such valuation. The total amount of debits is thus \$12,544.72. Such account-current includes, as credits, \$7,055.50, for proceeds of the auction sale of the damaged part of the cargo, less \$352.78 for commissions thereon to J. Niles & Co., at 5 per cent., and less \$20.00 for government fees on such sale, and \$6,106.24 for the amount of the three drafts drawn by the master on the claimants, less \$152.65, being 2½ per cent. thereon, as discount thereon, and less \$91.59, being 1½ per cent. commission thereon to J. Niles & Co., for endorsing and negotiating such drafts. The total amount of credits is thus \$12,544.72. The nett proceeds of the sale of cargo, \$6,682.72, more than cover all the items of debit, other than the \$6,875.00 commissions and fire insurance on cargo. J. Niles & Co. attended to the discharge, storing and reshipping of the cargo, to the sale at auction of the damaged portion of the cargo, and to making the repairs and
116 furnishing the outfits and materials to the vessel. They disbursed the \$216.27, the \$768.14, the \$1,832.38, and the \$2,582.93. The bills for the charges and expenses of the vessel and cargo were all of them submitted to the master, and examined by him, item by item, and approved as correct, at St. Thomas.

It is contended on the part of the claimants, that, according to the law of Great Britain, as the law governing in dealings with a British vessel, no implied authority exists in the master of a British vessel, even when in a foreign port, to pledge his vessel for necessities by any other form of hypothecation than a formal bottomry; and that the master of this vessel had no such authority, either express or implied.

There is no doubt, that from the time of Charles II, until the year 1840, it was the law of Great Britain, that no implied lien existed on a vessel for necessities supplied or repairs made, so as to enable the creditor to attach and sell her, to pay the debt. The rule established was that an express, formal instrument of hypothecation was necessary to give a lien for necessities or repairs; that such instrument must be one making the repayment of the money borrowed dependent on the arrival of the vessel at her destination; and that a master had no authority to hypothecate a vessel in any other manner. (*Stainbank vs. Fenning*, 11

C. B. 51; *Stainbank vs. Shepard*, 13 C. B. 418.) The high court of admiralty in England took no jurisdiction of a suit against a vessel founded on such an implied lien. (The two *Ellens*, Law Rep., 4 Privy Council Appeals, 161, 166). But, by the general maritime law and the civil law, such implied lien existed, and it extended to all vessels, foreign and domestic; and the courts of admiralty of the United States always took cognizance of suits in rem founded on such implied liens for supplies, and repairs, in the case of foreign vessels. The

117 rule of the courts of admiralty of Great Britain operated to the prejudice of persons in Great Britain furnishing supplies and repairs to foreign vessels, and also to the prejudice of foreign vessels, in the ports of Great Britain, in circumstances of distress or necessity, whenever personal credit failed the master. It was, therefore, provided by statute (Act of August 7th, 1840. 3 & 4 Victoria, chap. 65, § 6), "that the high court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever * * * for necessities supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the * * * necessities were furnished in respect of which such claim is made." The courts of admiralty of Great Britain hold that this provision gives a maritime lien on a foreign vessel for necessities supplied in a British port, which can be enforced in admiralty against the vessel. (The *Ella A. Clark*, 8 Law Times Rep., 119; The two *Ellens*, Law Rep., 3 Adm. & Eccl., 344, 354, and on appeal, in the Privy Council Law Rep., 4 Privy Council Appeals, 161, 167.) But such provision only applies to foreign vessels. On the 17th of May, 1861 (24 Victoria, Chap. 10 § 5), it was enacted, that "the high court of admiralty shall have jurisdiction over any claim for necessities supplied to any ship elsewhere than in the port to which the ship belongs, unless it be shown, to the satisfaction of the court, that, at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales." This provision is held to extend to necessities supplied in a British port to a vessel belonging to another British port. But, it has been held by the high court of admiralty (The *India*, 9 Jurist, new series, part 1,417), that the 6th section of the act of

118 1840 does not apply to necessities furnished in a foreign port, and that the 5th section of the act of 1861 does not apply to foreign ships. The latter clause of the 5th section of the act of 1861 is held to have the effect to prevent the ship from becoming chargeable with the debt for necessities at the time the necessities are furnished, so that all valid charges on the ship, to which any person other than the owner of the ship who is liable for the necessities is entitled, must take precedence of such debt, as a charge on the ship; but, as against the owner of the ship, the debt for necessities becomes a charge on the ship when a suit in rem therefor against the ship is instituted. (The *Pacific*, Brown and Lush., 243; The *Troubadour*, Law Rep., 1 Adm. and Eccl., 302; The two *Ellens*, Law Rep., 4 Privy Council Appeals, 161, 170.)

I do not deem it necessary to inquire whether the high court of admiralty in England would, under the 5th section of the act of 1861, take jurisdiction of a suit in rem against this British vessel, to enforce the lien claimed in this case for necessities supplied to such vessel in the Danish port of St. Thomas.

For, I am of opinion that the transactions above recited created no lien on this vessel. I do not mean to intimate that the jurisdiction of this court

fails because the necessities were furnished to a foreign vessel at a port foreign both to her and to the United States, or that jurisdiction in such cases, in rem, cannot be exercised by the admiralty courts of the United States.

The authority of a master of a vessel as to repairing her or supplying her with necessities, whether abroad or at home, is limited by the express or implied authority derivable from the laws of the vessel's country, or the usage of the trade, or the business of the ship, or the instructions of the owner; and he cannot bind either the vessel or her owner beyond such limits. In respect of money advanced in a

119 foreign port, for necessities, the inquiry is not as to the authority of the master by the law of the foreign port, but as to whether the money was advanced for necessities, or within the scope of the master's authority, according to the law of the vessel's country. The master has no power to bind the owner of the vessel, or the vessel herself, beyond the authority given to him by the owner; and the extent of such authority must be limited to the express instructions of the owner or to instructions to be implied from the law of the country where the vessel belonged and the owner resides. Private instructions, unknown to the person who advances money for necessities, cannot affect the right of such person, where he knows that the general maritime law of the country to which the vessel belongs imports authority in the master to make the contract relied on. But, even where such law, in the absence of instructions, would import such authority, instructions which limit such authority will, if made, known to the party who contracts with the master, before the contract is made, operate to prevent such party from claiming against the owner of the vessel anything which does not fall within the scope of such limited authority. (Abbott on Shipping, Amer. edition of 1829, p. p. 190 to 132; Pope vs. Nickerson, 3 Story, 465, 477 to 483.)

In the present case, the libellants have put in evidence the letter of December 24th, 1870, from the claimants to the master. That letter was made known to J. Niles & Co. and to the libellants. It authorized the raising of the funds by drafts on Heaney & Parker, or by drafts on the claimants, and states that the claimants have no doubt that the master will be able to obtain funds in that way. But it contemplates, as the alternative means, only a bottomry. It authorizes a bottomry if a resort to drafts fails. But it authorizes only drafts or a bottomry. It

120 must be regarded as excluding the master from resorting to anything but drafts or a bottomry, and as excluding him from resorting to the creation of a lien on the vessel by any form of hypothecation other than a bottomry, or to the creation of such a lien as is asserted in this case, whether an implied lien to result from the transactions, or whatever lien the language of the drafts may be claimed to create. J. Niles & Co. and the libellants declined to take the master's drafts, as authorized by the letter, and insisted that the master should undertake to create a lien on the vessel by other means than a bottomry. They insisted that the master should exceed his authority as defined and limited by the letter.

It is of no consequence to show that a resort to bottomry would have been more expensive to the claimants. They had a right to limit the authority of the master, and they did so. It is of importance to so administer the maritime law, that vessels in distress in foreign ports shall not be deprived of the means of obtaining relief, but it is no less important that masters of vessels, and persons dealing with them with

knowledge of the instructions under which they are acting, shall keep within the limits of such instructions.

As this is not a case communis juris, and both parties are foreigners, and the contract was made with reference to the law of the vessel's country, it is a case where the question of the liability of the owners of the vessel can, with especial propriety, be determined by the tribunals of such country.

The libel must be dismissed with costs.

J. Ridgway, for the libellants.

T. Scudder, for the claimants.

121 United States circuit court, southern district of New York.

J. H. FECHTENBERG ET AL., APPELLANTS,
vs.
 THE BARK WOODLAND, &C., WILLIAM W. TURN-
 ball & Charles Turnbull, claimants & appellees. }

Please take notice that the deposition of Archibald T. Heaney, a witness on behalf of the appellees, will be taken before Edward L. Owen, U. S. commissioner, at his office, number 71 Wall st., in the city of New York, on the 21st day of April, 1874, at 1½ o'clock in the afternoon, as further proof to be read on the trial of this cause, and you are hereby notified to be then and there present, and to put cross-interrogatories, if you shall think fit.

Dated April 17, 1874.

Yours, &c.,

SCUDDER & CARTER,
Proc. for Appellees.

To JAMES RIDGWAY, Esq.,
Proc. for Appellants.

122 (Endorsed :) U. S. circuit court. J. H. Fechtenberg et al., vs. Bark Woodland, &c. Notice of taking deposition. Scudder & Carter, proc. for cl'm'ts. Service of within notice admitted, April 17, 1874. James Ridgway, proc. for lib'ts.

123 UNITED STATES OF AMERICA :
Southern District of New York,
City, County, and State of New York, ss :

Be it remembered that, on this 21st day of April, in the year of our Lord one thousand eight hundred and seventy, I, Edward L. Owen, a commissioner, duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes, depending in the courts of the United States," passed February 20th, 1812, and the act of Congress, entitled "An act in addition to an act entitled "An act for the more convenient taking of affidavits and bail in civil causes, depending in the courts of the United States," passed March 1st, 1817, and an act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, at number 71 Wall street, in the city of New York, in the said southern district of New York, in the State aforesaid, Archibald T. Heaney, to testify and the truth to say, on the part and behalf of the appellees, in a certain suit or matter of controversy,

now depending and undetermined, in the circuit court of the United States, for the southern district of New York, at New York, on appeal from the district court of said district, wherein J. H. Fechtenberg & another are libellants & appellants against The Bark Woodland, &c., William W. Turnbull and Charles Turnbull, claimants & appellees.

And thereupon the said Archibald T. Heaney, having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Archibald T. Heaney, and he did thereupon depose, testify, and say as follows, viz, I am 54 years of age.

(Counsel for appellants objects on the ground that there can be no examination of the witness, the same being contrary to the rules of court, as the cause is now upon the calendar for hearing.)

Whereupon the examination is continued.

I was examined as a witness on the trial of the cause, in the district court, & produced on the trial the bill of exchange for \$1,500 gold, and signed by J. H. Titus, master, which is printed at folio 399 of the apostles in this case.

1. Q. When and from whom did you get that draft?

(Obj. to on the ground that the witness was examined on the trial of the cause specially in reference to this matter, and the same may be found at folios 67, 68, and 70, and all such testimony excluded by the district court under objection by the libellants, and is, therefore, res adjudicata.)

Ans. I received that draft from Captain J. H. Titus in my office just a few days after the barks Woodlands arrived here; Captain Titus commanded that vessel at that time, and this was the time she came from St. Thomas, and on her arrival here this libel was filed.

2. Q. State what transpired between you & Captain Titus in reference to this draft.

(Obj. to on the ground that Captain Titus is dead; that the appellants cannot be bound by anything that then transpired; that the testimony must necessarily be hearsay and incompetent.)

Ans. When the vessel arrived here, and we ascertained that the captain had made those drafts upon the owner, we telegraphed or wrote the owners. I told Captain Titus that we had stopped the payment of the drafts; finally he came in the second or third morning after I had done that, and wished to see me privately, and he said to me that he had one of those drafts, and as I had stopped payment, he wanted to know what he should do with it. I said to him, "Captain Titus, you got one of the drafts; how did you come by it?" He said to me that Mr. Niles agreed with him that if he would put the business of the vessel in his hands that he would give him such a portion of the proceeds; that he could not raise the money on the drafts at St. Thomas, and, instead of giving him the cash, had given him this \$1,500 draft, telling him that he could use it in New York, but not to let Heaney and Parker know anything about it. I said to him, Captain, you must deliver that draft over at once, or you will be arrested before night. I asked him previous to that if this draft was for the owner's benefit; he said it was not; it was for his own private use, & all captains got a share of such business in St. Thomas. He finally consented to give me the draft, and did so.

(Testimony of the witness also objected to on the ground that it appears at folio 69 of the apostles that the claimants offered to prove a similar state of facts on the trial; the same being objected to, was excluded by the court, and therefore cannot be here enquired of.)

126 The other two drafts were presented to my firm, I think probably before the conversation with Captain Titus.

Cross examination:

I could not say of my own knowledge whether the drafts had been presented prior to this conversation with Captain Titus. I understand Captain Titus is dead; he died a year or a year & a half ago; perhaps it was last summer.

A. T. HEANY.

Subscribed & sworn to before me this 21st day of April, 1874.

EDWARD L. OWEN,

U. S. Commissioner.

127 UNITED STATES OF AMERICA,

Southern District of New York, ss :

I, Edward L. Owen, a commissioner duly appointed by the circuit court of the United States, for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes, depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes, depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify, that the reason for taking the foregoing deposition is, and the fact is, the witness is material and necessary in the cause in the caption of the said deposition named, and the said cause is now pending in the circuit court of the United States for the southern district of New York, on appeal from the district court of the United States for said district.

I further certify that notification of the time and place of taking the said deposition was given in writing by the proctor for the appellee to the proctor for the appellant to be present at the taking of the deposition and to put interrogatories, if he or they might think fit, as appears from said notice, with the admission of service thereof hereto annexed, and that on the twenty-first day of April, in the year of our Lord one thousand eight hundred and seventy-four, I was attended by the proctors for the respective parties and by the witness, who was of sound mind and lawful age, and the witness was by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, and the deposition was by me reduced to writing, in the presence of the witness, and from his statements and to the witness subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of delivering the same with my own hand to the court for which the same was taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof I have hereunto set my hand and seal, this 21st day of April in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-eighth.

[L. S.]

EDWARD L. OWEN,

*United States Commissioner, duly appointed by the
Circuit Court of the United States for the Southern
District of New York, in the Second Circuit.*

128 (Endorsed:) U. S. circuit court, southern dist. of New York.
J. H. Fechtenberg & al., libellants and appellants, vs. The bank
"Woodland," &c., William W. Turnbull & Charles Turnbull, claimants
& appellees. Deposition of Archibald T. Heauey, a witness on behalf of
the appellees, taken the 21st day of April, 1874, before me, Edward L.
Owen, U. S. commissioner. Filed Apr. 24th, 1874.

129 At a stated term of the circuit court of the United States of
America for the southern district of New York, in the second cir-
cuit, held at the United States court rooms in the city of New York, on
Tuesday, the twenty-second day of May, in the year of our Lord one
thousand eight hundred and seventy-eight.

Present, the honorable Justice Hunt, associate justice Supreme Court
of the United States.

J. H. FECHTENBERG

vs.

THE BARK WOODLAND, HER TACKLE, &C. }

The above entitled cause coming on for hearing, on appeal from the
decree of the district court,

Mr. James Ridgway is heard on behalf of libellants and appellants.

Mr. George A. Black is heard on behalf of claimants & appellees.

C. A. V.

130 At a stated term of the circuit court of the United States for
the southern district of New York, held at the court-rooms in the
city of New York, on the 1st day of July, 1878.

Present Hon. Ward Hunt, circuit justice.

J. H. FECHTENBURG AND J. A. LOVENGREEN, }
as J. H. Fechtenburg & Co., libellants and ap-
pellants,

vs.

THE BARQUE WOODLAND, HER TACKLE, AP-
parel, furniture, and freight, William H. Turn-
bull & others, claimants & appellees. }

The above cause having come on to be tried on the pleadings and
proofs taken in this court, after hearing James Ridgway, esq., of coun-
sel for the appellants, and George A. Black, esq., of counsel for the ap-
pellees, on motion of Scudder & Carter, claimants' proctors, it is or-
dered, adjudged, and decreed, that the decree of the district court

131 dismissing the libel be, and the same is hereby, in all respects
affirmed; and it is further ordered, adjudged, and decreed that
the claimants recover of the libellants \$142.15, the amount of the de-
cree of the district court, with interest thereon from the 31st day of
January, 1874, amounting in all to \$179.10, together with \$125.00 costs
and disbursements, amounting together to \$304 $\frac{10}{100}$; and it is further
ordered, that a summary judgment be, and the same is hereby, entered
against the said libellants, the principals, and Frederick Ansoategin and
Edward D. Dennis, the sureties, for the sum of \$500, the amount of the
bond on appeal, and that the claimants have execution thereon to sat-
isfy this decree.

WARD HUNT,

Asso. Justice, Sup. Ct. U. S.

(Endorsed:) U. S. circuit court, south dist. of N. Y. J. H. Fech-

132 tenburg et al. vs. The barque Woodland, her tackle, &c. Decree. Scudder & Carter, clm'ts' proctors. U. S. circuit court. Filed July 13th, 1878. John I. Davenport, clerk.

133 *Bill of exception.*

U. S. circuit court for the southern district of New York, in the second circuit.

J. H. FECHTENBERG & J. A. LOVENGREEN,	}
libellants & appellants,	
vs.	
THE BARK WOODLAND, HER TACKLE, APPAREL, &c., William Turnbull & others,	}
claimants & appellees.	

This case came on to trial before the Hon. Ward Hunt, associate justice of the Supreme Court of the United States, at a term of the circuit court of the United States in and for the southern district of New York, in the second circuit, on the 21st day of May, A. D. 1878, on the appeal by the libellants from the final decree of the district court of the United States for the southern district of New York, dismissing the libel, with costs.

The counsel for the libellants read the libel, and the counsel for the claimants read the answer, as contained in the apostles or record transmitted from the district to the circuit court.

Counsel for the respective parties read the testimony taken and the depositions read on the trial in the district court, as contained in said apostles, counsel for each party reading the testimony taken and the depositions read on its own behalf, the party on whose behalf
134 the testimony was taken or read, whether oral or by deposition, reading the direct, and counsel for the other party reading the cross.

And the proctors for the claimants and appellees read in evidence the case of Stainbank vs. Fenning, 11 Common Bench, page 51, and the case of Stainbank vs. Shepard, 13 Common Bench, 418.

Claimants' proctor also offered in evidence the deposition of Archibald T. Heaney, taken as further proof in the circuit court. The proctor for the libellant objected to the reading of said deposition; the court sustained the objection and excluded the evidence; and the claimants excepted.

And here the testimony was closed, the above containing all the evidence that was put in on the question raised in the pleadings.

The counsel for the libellants and appellants thereupon proposed on their behalf the following statement of facts and conclusions of law to be found by the court:

As matter of fact—

1st. That in and during the months of January, 1871, the British barque Woodland (owned by the claimants, who resided at St.
135 John's, New Brunswick), being then in the Danish port of St. Thomas, West Indies, having put into that port in distress, leaking badly, bound on a voyage from Montevideo to New York, and standing in need of advances for repairs and supplies, disbursements and charges, J. Niles & Co., merchants in St. Thomas, advanced to J. H. Titus, the master of said vessel, for the purposes of said vessel, and on the credit of said vessel and owners, the sum of forty-six hundred

and six dollars and twenty four cents, for which the said master drew his two certain drafts or bills of exchange upon the owners of said vessel, dated 25th January, 1871, one for \$2,000, in American gold coin, payable ten days after sight, and one for \$2,606.24, in American gold coin, payable ten days after sight, whereby he pledged the said vessel, freight, and cargo for the payment of the same, and gave to whomsoever might be the holders of said drafts or bills of exchange a lien upon said vessel, freight, and cargo; and the said J. Niles & Co. took up said money on said drafts of the libellants and duly assigned to the said libellants the said drafts, and said demand for repairs and supplies, and advances, disbursements, and charges, and the lien therefor upon said barque's freight and cargo, and the said libellants advanced 136 said money on the credit of said vessel, cargo, and freight, and are owners of said lien.

2d. That said advances, repairs, disbursements, and charges were material and necessary for said vessel, without which she could not safely proceed upon her intended voyage, and earn freight and passage money, and the whole amount of said advances in American gold coin is due and unpaid to the libellants.

3d. That neither of said bills of exchange has been accepted or paid, although duly presented to said owners, and the libellants are now the legal owners and holders thereof.

As conclusion of law, I find that the appellants are entitled to have a decree reversing the decree of the district court, whereby the libel was dismissed, with costs, and are entitled to have a decree for the amount claimed and set forth in the libel, with costs.

The judge, thereafter, and after time taken for consideration, filed with the clerk of the circuit court findings of fact and conclusions of law, as found by the court, of which the following is a copy:

137 U. S. circuit court, southern district of New York.

J. H. FECHTENBERG AND J. A. LOVENGREEN, }
as J. H. Fetchenberg & Co., libellants and }
appellants, }

vs.

THE BARQUE WOODLAND, HER TACKLE, AP- }
parel, furniture, and freight, William W. Turn- }
bull & others, claimants and appellees. }

This cause having been brought to a hearing before me on the appeal, and the proctors of the respective parties having appeared and been heard, and the testimony on both sides and the issues on the pleadings submitted to me and duly considered, I find the following facts:

1st. That the British barque Woodland, owned by the claimants, who are residents of St. John, New Brunswick, in November, 1870, while on a voyage from Montevideo to New York, with a cargo, being in distress, put into the Danish port of St. Thomas for repairs, and that repairs were necessary before she could safely proceed on her 138 intended voyage.

2d. That on Dec. 24th, 1870, the claimants wrote a letter from St. John's to Capt. J. H. Titus, the master of the barque, at St. Thomas, which he received on January 11, 1871, and before any advances had been made by libellants exhibited the same to them, and this letter is set forth on pages 81, 82, and 83 of the apostles.

3d. J. Niles, who carried on business under the name of J. Niles & Co., attended to the affairs of the vessel at St. Thomas, landed the cargo, and sold a portion of it on which he received an amount sufficient to reimburse all the moneys expended, and charged commissions and insurance amounting to \$6,875.00. As to the insurance none was actually effected, and the commissions are on an excessive valuation.

4th. Titus, the master, approved all the bills, and drew drafts on his owners for the balance, \$6,106.24, which were expressed on their face to be "recoverable against the vessel, freight, and cargo." Two of these drafts the libellants discounted and for them this recovery is sought.

The third was given by Niles to the master upon a corrupt understanding, that it was to be his share. The two drafts have not been accepted or paid, and the libellants are the owners thereof.

5th. By the law of Great Britain the master of a British vessel has no implied authority, even when in a foreign port, to pledge his vessel for necessities or create a lien thereon by any other form of hypothecation than a formal bottomery bond, and the master of this vessel had no such authority, either express or implied.

6th. That the vessel and freight only were libelled in this action.

7th. The bills were received and the money advanced upon them by the libellants in good faith and without knowledge of the fraudulent acts of Niles & the captain of the Woodland.

And as conclusions of law I find:

1st. That no lien was created on the barque Woodland or her freight by the drafts recited, and none existed in favor of Niles & Co.

2d. That the fraudulent character of the accounts and dealings between Niles & Co. and Titus, the master, did not vitiate the drafts in the hands of the libellants, but that the same do not in law create a lien upon the vessel or the freight.

3d. That the decree of the district court should be affirmed with costs.

Let an order be entered accordingly.

WARD HUNT,

Ass. Justice, Sup. Court U. S.

And also filed with said clerk his opinion, as follows:

Opinion of Mr. Justice Hunt.

U. S. circuit court, southern district of New York.

J. H. FECHTENBERG ET AL.,	LIBELLANTS &
appellants,	}
<i>vs.</i>	
THE BARK WOODLAND, &C.,	
pellees.	}

Of the facts that this bark put into St. Thomas in distress; that repairs were there made upon her; that the drafts in question were made professedly on account of such repairs, and that the libellants advanced their money upon them without knowledge of any fraud on the part of Niles and the captain, there can be no doubt. The bills for the repairs were made out extravagantly, fraudulently, and collusively. If the drafts were made by those having authority to act as the agents of the owners of the vessel in such

141 an emergency, and to bind them by drafts given honestly and wisely, I cannot see that the frauds of such agents can be charged upon the bona fide holders of the drafts, so as to defeat their collection. The captain was not the agent in any manner of the libellants, but the agent of the owners and of the vessel, so far as his position gave him authority, and for his frauds the owner is the party responsible. It is proved affirmatively by the evidence of the libellants that they paid their money for the drafts before their maturity, and without knowledge or suspicion of fraud or irregularity, and there is no evidence to contradict their statements. I have therefore found and decided that, so far as the fraud and irregularity are concerned, the drafts were not avoided in the hands of the libellants.

Neither am I able to concur in the conclusion that the authority of the captain was limited and restricted by the letter of his owners, dated December 24, 1870, and which was shown to the libellants. It is contended that this letter authorized the captain to draw on Heaney & Parker for the expenses, or on the owners, if it can be better done, or to give a bottomery bond, and that it excludes the authority to
142 create a lien on the vessel in any other form. The language of the letter supposed to have this effect is as follows: "As soon as Heaney & Parker heard of the disaster they wrote you to draw on them for funds to pay for your repairs, and sent letters to G. W. Smith & Co. to show their standing. With these, we doubt not, you will be able to obtain your funds cheaply, and thereby avoid the great expense of a bottomery, or, if it could be done better, draw on us, either payable here or in New York (in gold)."

The letter proceeds: "We will merely add that we hope you will use your best judgment and your best exertions for the interest of all concerned," and inasmuch as you must have friends to advise and assist you, endeavor to select those who are honest and honorable, and have nothing to do with men who would counsel fraud, as too many are disposed to do when they think they have an opportunity to make money out of underwriters."

This is a letter from the owners, at a distance, to their captain, in an emergency, giving their advice and counsel, and suggesting what appear to them the best modes of relieving himself and vessel from the difficulties surrounding them. It advises, first, that the drafts be drawn
143 on Heaney & Parker, or that drafts be drawn on them directly, payable either at St. John, N. B., or in New York, and that the expense of a bottomery proceeding be avoided; there is not, however, anything that will bear the construction that he may not resort to any legal method of obtaining the necessary repairs for his vessel. This is strikingly evident from the clause following, where the letter says: "We hope you will use your best judgment and your best exertions for the interest of all concerned." The sense of it is that the writers suggest what to them, at a distance, appear to be the better mode of raising the money, but leave it in the end to the judgment and discretion of the captain. This left it with him to raise the supplies in any manner that the law would permit. If he had raised them by drafts on Heaney & Parker, or by drafts on the owners, there would have been secured the personal liability of the parties named; if by bottomery bond, with the formalities required by law, a lien would have been created upon the vessel. He took neither of these courses, but drew bills upon his owners at ten days' sight, concluding with these words: "Which place to the account of disbursements of bark Woodland and cargo at this port, and recoverable against the vessel, freight, and cargo," and signed

144 them as master. "Whereby (the libel alleges) he pledged the said vessel, freight, and cargo for the payment of the same, and gave to whomsoever might be the holders of said drafts or bills of exchange a lien upon said vessel, freight, and cargo," and the libel prays that the court may condemn the said vessel, her freight, and cargo, to pay the said sum, with interest and costs.

The question here presented is, did the transactions described, or did the drafts thus given and thus expressed, create a lien upon the vessel and her freight? Had this English master of an English vessel authority to create a lien in the foreign port of distress in any other mode than by a written instrument of hypothecation, which made the debt dependent upon the safe arrival of the vessel, to wit, by a bottomery bond?

If the vessel had sailed under the flag of the United States, and her master had been a citizen of the United States, this question would be answered in the affirmative. The case of the *Emily Souder* (17 Wallace, 666) decides that the furnishing of the supplies and mate-
145 rials in a foreign port of distress itself creates a lien upon the vessel in favor of the person furnishing them, and that such lien is not destroyed by the acceptance of drafts on the owners in the ordinary form, making no reference to the lien, and the departure of the vessel from the port of distress, and that admiralty has jurisdiction to enforce this lien against the vessel.

But it seems to be settled that the question is to be determined by the law of the country of which the master was a citizen and under whose flag the vessel sailed, not by the law of the port where the supplies were furnished, or of the country where the lien is sought to be enforced. *Loyd vs. Gilbert*, 6 Best & Smith, 117, (Eng. Com. Law Rep.)

On the point of the right to create the lien otherwise than by bottomery security, reference is made to *Carrington vs. Pratt*, (18 How., 63), where Nelson, J., uses this language: "It has been recently held in the court of exchequer in England that the master can pledge the ship for repairs or loan of money for that purpose in the foreign port only by bottomery security, and that in the absence of this, the merchant must look to the responsibility of the owner or master."

146 The point was not decided in the case but expressly waived by the court. Reference is made to the following cases:

Stainbault vs. Fenning, 11 Com. Bench, 51 (2 J. Scott). The master here borrowed money necessary for repairs and gave a mortgage or hypothecation of the vessel for the amount payable absolutely, and drew bills on the owners for the same (the payment not being made dependent on the arrival of the vessel). It was held that the lenders could not proceed against the vessel in the admiralty court of England, and therefore had no insurable interest on which the suit could be maintained.

Stainbank vs. Shepard, 13 C. B., 418 (4 J. Scott), was an action by the same plaintiff against different defendants, upon substantially the same facts, and it was held that, not being such an hypothecation as could be enforced in the court of admiralty, the payment of the money not being made to depend upon the arrival of the vessel, the merchant had no insurable interest in the ship.

147 Both of these cases are decided upon the ground "that it is essential to the validity of hypothecation that the sea risk should be incurred by the lender, and that the pledge on the vessel should take effect only in the event of the safe arrival." The opinion in the latter case is delivered by Baron Parke, and in the former by

Lewis, Ch. J. In each case, as in the case before us, the instrument of hypothecation was accompanied by the drafts of the master upon the owners.

Upon the authority of these cases and from my high respect for the experience and learning of the district judge who decided this case below, I shall affirm the decree dismissing the libel.

The amount in controversy, with the added interest, makes this case one which can be carried by appeal to the Supreme Court of the United States, and I make the decision with less hesitation, knowing that the party can correct the error (if there be one) by such appeal. Should I be mistaken in supposing that there is a right of appeal, I will entertain a motion for a rehearing and confer with such of my brethren of the Supreme Court as I may be able conveniently to reach.

148 And thereafter, upon notice thereof, and before judgment or decree thereon, the counsel for the libellants filed in the office of the clerk of said court and served upon the claimant's counsel a proposed bill of exceptions, containing the following exceptions :

Exceptions by the libellants to the rulings, findings, and decision of the judge before whom the cause was tried on the appeal in the circuit court, and to his refusals and omissions to find as requested.

FIRST EXCEPTION. For that the said judge did not find as matters of fact, as proposed by the libellants on the trial, as follows :

1st. That in and during the month of January, 1871, the British barque Woodland (owned by the claimants, who resided at St. John, in New Brunswick), being then in the Danish port of St. Thomas, West Indies, having put into that port in distress, leaking badly, bound on a voyage from Montevideo to New York, and standing in need of advances for repairs and supplies, disbursements and charges, J. Niles & Co., merchants in St. Thomas, advanced to J. H. Titus, the

149 master of said vessel, for the purpose of said vessel, and on the credit of said vessel and owners, the sum of forty-six hundred and six dollars and twenty-four cents, for which the said master drew his two certain drafts or bills of exchange upon the owners of said vessel, dated 25th January, 1871, one for \$2,000 in American gold coin, payable ten days after sight, and one for \$2,606.24 in American gold coin, payable ten days after sight, whereby he pledged the said vessel, freight, and cargo for the payment of the same, and gave to whomsoever might be the holders of said drafts or bills of exchange a lien upon said vessel, freight, and cargo, and the said Niles & Co. took up said money on said drafts of the libellants and duly assigned to the said libellants the said drafts and said demand for repairs and supplies, and advances, disbursements and charges, and the lien therefor upon said barque's freight and cargo, and the said libellants advanced said money on the credit of said vessel, cargo, and freight, and are owners of said lien.

SECOND EXCEPTION.—For that the said judge did not find as matters of fact as proposed by the libellants on the trial, as follows :

150 2d. That said advances, repairs, disbursements, and changes were material and necessary for said vessel, without which she could not safely proceed upon her intended voyage and earn freight and passage money, and the whole amount of said advances in American gold coin is due and unpaid to the libellants.

THIRD EXCEPTION.—For that the said judge did not find as matters of fact as proposed by the libellants on the trial, as follows :

3d. That neither of said bills of exchange has been accepted or paid, although duly presented to said owners, and the libellants are now the legal owners and holders thereof.

FOURTH EXCEPTION.—For that the said judge did not hold or decide or find as matter or conclusion of law, as proposed and requested by the libellants, as follows:

I find that the appellants are entitled to have a decree reversing the decree of the district court, whereby the libel was dismissed with costs, and are entitled to have a decree for the amount claimed and set forth in the libel with costs.

151 FIFTH EXCEPTION.—For that upon the case as presented upon the pleadings and proofs in the circuit court, the said judge did not direct that the decree dismissing the libel with costs should be reversed, and a decree be entered in favor of the libellants for the amount claimed and set forth in the libel with costs.

SIXTH EXCEPTION.—The libellants except separately to each of the following findings of fact in said judge's findings of fact, as not only contrary to the evidence, but without any sufficient or legal evidence to support them:

1. His finding as of fact to the effect that the letter of the claimants received by Capt. Titus, at St. Thomas, on January 11, 1871, was so received before any advances had been made by the libellants, instead of finding that the advances in question for the necessities of the said bark had been made or incurred prior to the receipt of said letter.

2. His finding as of fact that as to the insurance none was actually effected, and that the commissions were on an excessive valuation, instead of finding that the insurance was effected by J. Niles & Co., and the commissions were on a proper valuation.

152 3. His finding that the third draft was given by Niles to the master upon a corrupt understanding that it was to be his share, instead of finding that the third draft formed a part of the proper charges of J. Niles & Co. against the said bark, but which, by previous arrangement with the master, was to be returned to him, and was so returned to him, to be delivered up to the owners of the bark, as a concession or deduction from the proper charges of said J. Niles & Co.

4. His finding that by the law of Great Britain the master of a British vessel had no implied authority, even when in a foreign port, to pledge his vessel for necessities, or create a lien thereon, by any other form of hypothecation than a formal bottomry bond, and that the master of this vessel had no such authority, either expressed or implied, instead of finding that the master of this vessel had authority to pledge his vessel for necessities, or to create a lien thereon, in the form which was adopted in this instance by the master.

153 SEVENTH EXCEPTION.—In view of the facts as found, that the claim made in the libel cannot be maintained, because the vessel was a British vessel. It is wholly immaterial to relieve the claimants from payment of the advances to the distressed vessel, whether she was British or American, inasmuch as the contract was made in a Danish port, to be performed at the American port of New York, where the vessel was bound, where her cargo was owned, where she safely arrived, and where she was libelled for non-performance of the contract.

The libellants and appellants, therefore, except to the assumption in such findings of the court of such materiality.

EIGHTH EXCEPTION.—The libellants and appellants except to the conclusion of law, as found by the court, that no lien was created on the barque Woodland or her freight by the drafts recited, and to the

conclusion that no lien existed thereon in favor of Niles & Co., as unwarranted by the facts as found by the court, so far sustained by any evidence.

NINTH EXCEPTION.—The said libellants also except to said conclusion of law as unwarranted by the facts as found by the court.

154 TENTH EXCEPTION.—The libellants and appellants except to the conclusion of law found by the court, to the effect that the accounts and dealings between Niles & Co., and Titus, the master, were of a fraudulent character, and that the same do not in law create a lien upon the vessel or the freight as unwarranted by the facts as found by the court, so far as sustained by any evidence.

ELEVENTH EXCEPTION.—The said libellants also except to said conclusion of law as unwarranted by the facts as found by the court.

TWELFTH EXCEPTION.—The libellants and appellants except to the conclusion of law found by the court, that the decree of the district court should be affirmed with costs.

The decree entered with the clerk of the said circuit court for the southern district of New York, on the 13th day of July, 1878, was founded upon the aforesaid findings of fact and conclusions of laws of said judge.

And inasmuch as the said several matters produced and given
155 in evidence on the trial in said circuit court, and by the counsel for the libellants objected and insisted on, and the said exceptions do not appear by the record of the decree of said judge, the counsel for said libellants has prepared and caused this bill of exceptions to be settled as a record thereof, according to the form of the statute in such case made and provided, and the course and practice of the court, and to be signed and ordered on file by the judge.

(Signed)

WARD HUNT,

Asso. Just. Sup. Ct. U. S.

(Endorsed:) U. S. circuit court, so. dist. of New York. J. H. Fechtenburg et al., appellants, vs. The Bark Woodland, her tackle, &c., appellees. Bill of exceptions. James Ridgway, pro. for appellants, 171 Broadway, N. Y. U. S. circuit court. Filed Sep. 14, 1878. John I. Davenport, clerk.

156 U. S. circuit court for the southern district of New York, in the second circuit.

J. H. FECHTENBURG & J. A. LOVENGREEN, }
libellants & appellants, }

vs.

THE BARK WOODLAND, HER TACKLE, APPA- }
rel, &c., William W. Turnbull, & others, }

claimants and appellees.

Please take notice that J. H. Fechtenburg et al., the libellants in the above-entitled cause, hereby appeal to the Supreme Court of the United States from the whole & every part of the final decree entered in the above-entitled cause with the clerk of this court, on the 13th day of July, 1878, bearing date the 1st day of July, 1878.

Dated New York, July 15th, 1878.

JAMES RIDGWAY,

Proctor for Libellants & Appellants.

To Messrs. SCUDDER & CARTER,

Proctors for Claimants & Appellees.

John I. Davenport, esq., clerk, &c.

157 (Endorsed:) U. S. circuit court, so. dist. of N. Y. J. H. Fechtenburg et al. vs. The Bark Woodland, her tackle, &c. No. of appeal. James Ridgway, pr. for lib's & app'l'ts, 171 Broadway, N. Y. U. S. circuit court. Filed Jul. 15, 1878. John I. Davenport, clerk.

158 Supreme Court of the United States.

J. H. FECHTENBURG & J. A. LOVENGREEN, }
libellants & appellants, }
vs. }
THE BARK WOODLAND, HER TACKLE, APPAREL, }
&c., William W. Turnbull & others, claimants }
& appellees. }

To the honorable the Supreme Court of the United States:

The petition of appeal of the above-named appellants respectfully sheweth: That on or about the 2nd day of March, 1871, the above named libellants filed their libel in the district court of the United States for the southern district of New York against the said bark Woodland, her tackle, apparel, &c. and freight, in a cause of contract, civil and maritime, praying, among other things, that the said court would pronounce for the claim in said libel set forth, and would condemn the said bark and freight, and all persons intervening for their interest therein, with costs, to which said libel these appellants pray leave to refer for its contents.

That on or about the 2nd day of March, 1871, the said claimants filed their claim to the said bark and freight and executed the necessary stipulations for costs and value, according to the course and practice of said district court, and thereafter, on or about the 10th day of January, 1872, the said claimants of the said bark and freight filed their answer to the said libel in the district court, praying that the said libel be dismissed and the said libellants condemned in costs, as will more fully appear on reference to said answer, and to which for the contents these appellants pray leave to refer.

And such proceedings were thereafter had in said cause that said cause came on to be heard before the honorable Samuel Blatchford, judge of the said district court, on the 3rd and 4th days of December, 1873, upon the allegations and proofs adduced by the respective parties, and the said judge having advised thereon, afterward, on the 31st day of January, 1874, made a final decree or sentence in said cause, whereby it was in substance ordered, adjudged, and decreed that the said libel filed in said cause be dismissed, with costs, and that the said claimants recover of the said libellants the sum of \$142.15 costs as taxed, as will more fully appear by reference to said decree, to which reference is had for its contents.

And that after such final decree an appeal was taken to the circuit court of the United States for the southern district of New York by the said libellants, and the said cause was removed thereby to the said circuit court, and such proceedings were had in said circuit court that on or about the 13th day of July, 1878, a decree was made, bearing date July 1st, 1878, wherein it was ordered, adjudged, and decreed that said decree of said district court dismissing said libel with costs be affirmed with costs.

And these appellants are advised and insist that the said decree is erroneous, inasmuch as said claimants were not entitled to have said

decree affirming the decree of the district court, whereby said libel was dismissed with costs, but said libellants and appellants were entitled to have and should have had a decree reversing the decree of the said district court, with costs, and decreeing to them the amount claimed by them and set forth in said libel.

Wherefore these appellants for these and other reasons appeal from the whole and each and every part of the said decree of the said circuit court to the Supreme Court of the United States; and upon the said appeal they intend to seek a new decision on the facts and on the law, on the pleadings and proofs in the district court, and they respectfully pray that the said decree of said circuit court, and the libel, answer, depositions, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that said Supreme Court will proceed to hear the said cause, and that the said decree of the circuit court may be reversed and a decree made in favor of the appellants for the amount claimed by them and set forth in the libel, with costs, or such other decree made as to the said Supreme Court shall seem just.

And your petitioners will ever pray, &c.

Dated New York, July 15th, 1878.

JAMES RIDGWAY,

Proctor for Libellants & Appellants.

Due service of a copy of above petition of appeal is hereby admitted this 20th day of July, 1878.

SCUDDER & CARTER,

Att'ys for Appellees.

(Endorsed:) Supreme Court of the United States. J. H. Fechtenburg et al., appellants, vs. The Bark Woodland, her tackle, &c., appellees. Petition of appeal. James Ridgway, pr. for appellants, 171 Broadway, N. Y. U. S. circuit court. Filed July 23rd, 1878. John I. Davenport, clerk.

163

Bond for costs.

Circuit court of the United States of America for the southern district of New York, in the second circuit.

J. H. FECHTENBURG ET AL., LIBELLANTS & }
appellants, }

vs.

THE BARK WOODLAND, HER TACKE, APPAREL, }
&c., claimants & appellees. }

Know all men by these presents that we, Edward D. Dennis and Frederic' Waydell, are held and firmly bound unto the above named claimants in the sum of six hundred dollars, to be paid to the said claimants, for the payment of which well and truly to be made we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 17th day of July, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas the above named J. H. Fechtenburg et al. have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the

above named J. H. Fechtenburg et al. shall prosecute said appeal to effect, and answer all damages and costs if said appellants fail to make the same good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

EDWARD D. DENNIS.
FREDERICK WAYDELL.

Sealed and delivered, and taken and acknowledged this 17th day of July, 1878, before me.

JOHN A. SHIELDS,
U. S. Com'r, S. D. of N. Y.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Edward D. Dennis, residing at 362 State street, Brooklyn, and Fred-
eric Waydell, residing at No. 33 East 38th street, New York City, being
severally duly sworn, do depose and say, and each for himself
165 says that he is worth the sum of six hundred dollars over and
above all his just debts and liabilities.

EDWARD D. DENNIS.
FREDERIC WAYDELL.

Sworn to this 17th day of July, A. D. 1878, before me.

JOHN A. SHIELDS,
U. S. Com'r, S. D. of N. Y.

The foregoing bond is approved.
July 23rd, 1878.

SAM'L BLATCHFORD.

(Endorsed:) U. S. circuit court. J. H. Fechtenburg et al., appellants,
vs. The Bark Woodland, her tackle, &c., appellees. Bond for
166 costs on appeal. James Ridgway, appellants' proctor. Approved
as to form and sufficiency of sureties. Scudder & Carter, att'ys
for appellees. U. S. circuit court. Filed Jul' 23, 1878. John I. Dav-
enport, clerk.

167 By the honorable Samuel Blatchford, one of the judges of the
circuit court of the United States for the southern district of
New York, in the second circuit.

To the bark Woodland, her tackle, apparel, and furniture and freight,
and William W. Turnbull and Charles Turnbull, claimants:

Whereas, J. H. Fechtenburg and J. A. Lovengreen, libellants, have
lately appealed to the Supreme Court of the United States from the
whole and every part of a decree lately rendered in the circuit court of
the United States for the southern district of New York in your favor
and against the said libellants, as stated and alleged in the notice and
petition of appeal of said libellants, and have filed the security required
by law; you are therefore hereby cited to appear before the said Su-
preme Court at the city of Washington, on the 2d Monday of October
next, to do and receive what may appertain to justice to be done in the
premises.

168 Given under my hand at the city of New York, in the southern
district of New York, in the second circuit, this 23rd day of July,
in the year of our Lord one thousand eight hundred and seventy-eight.

SAM'L BLATCHFORD.

Due service of a copy of the foregoing citation is hereby admitted this 27th day of July, 1878.

SCUDDER & CARTER,
Pr's for Appellees.

(Endorsed:) U. S. circuit court. J. H. Fechtenburg et al., appellants, vs. The bark Woodland, her tackle, &c., appellees. Citation. James Ridgway, pr. for appellants, 171 Broadway, N. Y. Service admitted July 27th, '78. Scudder & Carter. U. S. circuit court. Filed Jul' 29, 1878. John I. Davenport, clerk.

170 UNITED STATES OF AMERICA,
Southern District of New York, ss :

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to one hundred and seventy inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of J. H. Fechtenburg and J. A. Lovengreen, libellants and appellants, against the bark Woodland, her tackle, apparel, &c., William W. Turnbull & Charles Turnbull, claimants & appellees, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 26th day of September, in the year of our Lord one thousand eight hundred and seventy-eight and of the Independence of the said United States the one hundred and third.

[SEAL.]

JOHN I. DAVENPORT, *Clerk.*

(Indorsement on cover:) No. 334. J. H. Fechtenburg & J. A. Lovengreen, as J. H. Fechtenburg & Co., appellants, vs. The bark Woodland, her tackle, &c., and cargo & freight, Wm. W. & Chas. Turnbull, cl'm'ts. S. New York C. C. U. S. Filed 12th November, 1878.

Supreme Court of the United States

J. H. FRECHTENBERG and J. A. LOVENGREEN, as J. H.
FRECHTENBERG & CO.,

Appellants.

VS.

The Bark WOODLAND, her Tackle, &c., and Cargo, and
Freight, WILLIAM W. TURNBULL and CHARLES
TURNBULL.

Claimants.

appellee

Brief and Points on the Part of the Appellants

JAMES RIDGWAY,

Proctor and of Counsel for Appellants.

SCUDDER & CARTER,

Proctors and of Counsel for Appellees.

NEW YORK :

LIVINGSTON MIDDLEBURY, LAW PRINTER, 20 COURTLANDT STREET.

1891.



Supreme Court of the United States.

J. H. FECHTENBURG and J. A. LOVEN-
GREEN, as J. H. FECHTENBURG &
Co.,

Appellants,

vs.

The Bark WOODLAND, her tackle, &c.,
and cargo and freight, WILLIAM
W. TURNBULL and CHARLES TURN-
BULL,

Claimants.

appellees

**Appeal from the Circuit Court of the United States for
the Southern District of New York.**

**Brief and Points on the Part of the
Appellants.**

This action was brought to recover the sum of four thousand six hundred and six dollars and twenty-four cents (\$4,606,24), in gold, being the amount advanced at the port of St. Thomas, in the Danish West Indies, to pay for certain repairs and supplies to the British bark Woodland, of St. John, N. B., where her owners, the claimants, resided, she having been obliged to put in to said port of St. Thomas in a disabled and distressed condition.

The facts of the case are quite fully set forth in the opinion of the District Judge (Blatchford), at pages 52 to 56 of the record, as follows :

“The libel in this case sets forth, in its first article, that this is an action founded upon contract, civil and maritime. It sets forth, in its second article, that in January, 1871, the British bark Woodland, being in the port of St. Thomas, in the West Indies, and standing in need of advances for repairs and supplies, disbursements and charges, J. Niles & Co., merchants in said St. Thomas, advanced to the master of said vessel, for the purposes of said vessel, and on the credit of said vessel and owners, the sum of \$4,606.24, for which the said master drew his two certain drafts or bills of exchange, upon the owners of said vessel, dated January 25th, 1871; one for \$2,000, in American gold coin, payable ten days after sight, and one for \$2,606.24, in American gold coin, payable ten days after sight, whereby he pledged the said vessel, freight and cargo for the payment of the same, and gave to whomsoever might be the holders of said drafts, a lien upon said vessel, freight and cargo: that said J. Niles & Co., took up said money, on said drafts, of the libellants, and duly assigned to the libellants the said drafts, and said demand for repairs and supplies, disbursements and charges, and advances, and the lien therefor upon said vessel, freight and cargo; and that the libellants advanced said money on the credit of said vessel and cargo and freight, and are owners of said lien. The third article of the libel sets forth, that said advances, repairs, disbursements and charges, were material and necessary for said vessel, without which she could not safely proceed upon her intended voyage, and earn freight and passage money; and that the whole amount of said advances, in American gold coin, is due and unpaid to the libel-

lants. The fourth article of the libel sets forth, that neither of said drafts has been accepted or paid, although duly presented to said owners; and that the libellants are the legal owners and holders thereof. The libel prays process against the vessel and freight.

"The answer of the owners of the bark (being the same persons who were her owners at the time of the transactions set forth in the libel), denies the foregoing allegation of the first article of the libel. It admits that the bark was in the port of St. Thomas, in January, 1871, and denies all the other allegations of the second article of the libel, except as afterwards admitted in the answer. It denies the allegations of the third article of the libel.

"It admits that, while the bark was at St. Thomas, her master drew three drafts on her owners, and delivered them to the firm of J. Niles & Co. It denies that such drafts created any lien upon either vessel or cargo, and denies that J. Niles & Co. took up the money on said drafts, of the libellants, or assigned to the libellants the drafts, or the alleged demand for repairs, supplies, disbursements, charges, or advances, or the alleged lien therefor; and denies that the alleged advances for which the drafts were given were made for the purposes of the vessel, or on her credit. It avers that a large portion of the alleged advances, if made at all, were made for the pretended purposes of the cargo of the vessel, and on the credit of such cargo, and neither the vessel nor the freight is liable for the same; that this Court has no jurisdiction over the case, and neither vessel nor cargo should be held responsible; that when the drafts were given, the bark was on a voyage from Montevideo to New York, with a cargo, and had put into St. Thomas for repair; that an agreement was made between the master of the bark and J. Niles & Co., by which the latter were to act as the agents

of the vessel and her cargo, for which they were to receive a commission of $2\frac{1}{2}$ per cent. upon the value of her cargo; that the cargo was also to be stored for two per cent. upon its value; that in the settlement of the accounts, the cargo was valued at \$125,000 gold, and the percentage aforesaid was estimated upon that basis, and the drafts drawn were made to include the percentage so arrived at; that in fact such valuation was greatly in excess of the true market value of such cargo, which was not worth to exceed \$80,000, gold, and the percentage aforesaid, if it should have been allowed at all, should have been estimated only upon the last named sum; that another item going to make up the amount of said drafts was the sum of \$1,250, being one per cent. upon such valuation, for fire insurance alleged to have been made upon said cargo; that such fire insurance if actually made, was illegal and unauthorized, and neither the cargo, nor its owners, nor the bark, nor her freight, nor their owners, should be held responsible therefor; that the amount of the foregoing overcharges and unauthorized alleged expenses, which have gone to make up such drafts, is \$3,275 gold, as to which amount neither the bark, nor her freight, is liable in any event; and that the said three drafts, and all the charges and disbursements made in St. Thomas were made under a fraudulent agreement and conspiracy, between the said master and the said J. Niles & Co., that the said charges were to be fraudulently increased, and that the said master and the said J. Niles & Co. were to share in such drafts or the proceeds thereof, and, by reason of such fraud, the said drafts were void and the said J. Niles & Co. and the libellants never had any lien on the vessel.

“The barque was a British vessel, owned by persons residing at St. John, in New Brunswick. In November, 1870, while on a voyage from Montevideo

to New York, with a cargo, she put into St. Thomas, a Danish port, in distress, leaking badly and needing repairs. The firm of J. Niles & Co. had been established there for twelve years, as commission merchants and ship-agents. The master of the bark, Capt. Titus, applied to J. Niles & Co. to attend to the business of the vessel, stating that he had been instructed to do so by his owners, in the event of his having to call at St. Thomas. J. Niles & Co. took charge of the vessel and cargo. The cargo was discharged and stored, in order to ascertain the full extend of the damage to the vessel, and to enable the repairs to be made.

"The vessel was taken out of the water, the metal was stripped from her bottom, her bottom and her top sides were recaulked, her spars and rigging were renewed or repaired, and she was put into a seaworthy condition to proceed on her voyage with her cargo. Some of the cargo was found to be badly damaged by sea water, and was sold at public auction, and the rest was re-shipped on the bark for New York. This occupied about two months. For the balance of the indebtedness claimed by J. Niles & Co., for services and expenses for the vessel and her cargo, after deducting the net proceeds of the damaged part of the cargo that was sold at auction, J. Niles & Co. received from the master three drafts, drawn by him at St. Thomas, on the owners of the bark at St. John, New Brunswick (who are the present claimants of her), payable to the order of J. Niles & Co., in American gold coin, in New York, for the several sums of \$2,000, \$2,606.24 and \$1,500. The drafts were dated January 25th, 1871, and were payable ten days after sight, and each contained, on its face, the words "place to account of disbursements of bark Woodland and cargo, at this port, and recoverable against the vessel, freight and cargo." The draft for \$1,500 was, as Mr. Niles testifies, "re-

turned to Captain Titus, in accordance with agreement, for benefit of owners." J. Niles & Co. first endeavored, unsuccessfully, to obtain the necessary funds through the firm of G. W. Smith & Co., of St. Thomas. They then made an agreement with Captain Titus to raise the required funds by bottomry on the vessel and respondentia on the cargo. But that was not carried out, because it was superseded by a conditional agreement by J. Niles & Co. to take drafts drawn by the master on the claimants. On the 24th of December, 1870, the claimants wrote from St. John, a letter to Captain Titus, at St. Thomas, to the care of J. Niles & Co., which letter reached St. Thomas on the 11th of January, 1871. In that letter, after acknowledging the receipt of advices from the master and from J. Niles & Co., in reference to the disasters to the vessel, the claimants say "The vessel and freight are but partly insured, but whether insured or not, *you have simply to do your duty.* We may say to you, however, that unless the vessel is much worse than would appear from the vague information furnished us, you would not be justified in having her condemned. Should she be improperly condemned, we could not recover a penny of our insurance. The underwriters talk of sending out their agents, and will certainly do so unless they think everything has been fairly and properly done. On the other hand, should it cost more to repair than the vessel will be worth when done (she is valued in the policies at \$10,000), we would have trouble, at least, in collecting. *As we are so entirely ignorant of the real facts of the case, we can give no positive advice* in regard to the foregoing. It seems to us, almost, as if you were out of the world, the communication is so tedious. On receipt of Messrs. Niles' letter this morning, we were greatly alarmed, and we telegraphed to Heaney & Parker, New York, as follows: "Send following instructions to Titus,

quickest manner, cable or otherwise, namely,—make only such repairs as will bring vessel and cargo to New York, hiring extra hands; otherwise, proceed to St. John under temporary repair, re-shipping cargo on other vessel.” This explains itself. Of course, if you have to re ship the cargo in another vessel, you will procure as low freight as possible, as the Woodland will receive the difference between what she was to pay [receive] as per bills of lading, and that you may have to pay from St. Thomas to New York. You will also have to retain a lien upon the cargo for its contribution towards the general average expenses. [As soon as Heaney & Parker heard of the disaster, they wrote you to draw on them for funds to pay for your repairs, and sent letters to G. W. Smith & Co., to show their standing. With these, we doubt not you will be able to obtain your funds cheaply, and thereby avoid the great expense of a bottomry; or, if it could be done better, draw on us, either payable here or in New York, in gold.] *We will merely add, that we hope you will use your best judgment, and your best exertions, for the interest of all concerned.”* G. W. Smith & Co., *having declined to furnish the funds, and the agreement to provide by bottomry and respondentia having been made, the letter from the claimants arrived, and, in consequence of their views expressed therein, the idea of bottomry was abandoned, and the conditional agreement to take drafts drawn on the claimants was made.* To carry that out, J. Niles & Co. offered to sell the proposed drafts which were to be drawn, to the libellants, at the same time showing to them the passage in the said letter from the claimants, authorizing the master to draw on them, and referring to bottomry, being the passage above recited embraced in brackets. After reading the passage, the libellants declined to purchase the drafts, on the ground that they were not acquainted

with the standing of the claimants, unless the master would, in drawing the drafts, make them recoverable against vessel, freight and cargo. This was agreed to by the master, and carried out. The libellants bought the two drafts mentioned in the libel, at $2\frac{1}{2}$ per cent. discount, and paid for them in cash to J. Niles & Co. J. Niles & Co. endorsed the drafts in blank, and delivered them to the libellants. The money and materials furnished, and the work done, were furnished and done on the recommendation of surveyors, appointed with the approbation of the master, and by the authority of the master."

In his opinion, Judge Blatchford said: "I do not deem it necessary to enquire whether the High Court of Admiralty in England, would, under the 5th section of the Act of 1861, take jurisdiction of a suit *in rem* against this British vessel, to enforce the lien claimed in this case for necessities supplied to such vessel in the Danish port of St. Thomas." And: "I do not mean to intimate that the jurisdiction of this Court fails because the necessities were furnished to a foreign vessel at a port foreign both to her, and to the United States, or that jurisdiction in such cases, *in rem*, cannot be exercised by the Admiralty Courts of the United States." But: "I am of opinion that the transactions above recited created no lien on this vessel": because the master exceeded his authority as defined and limited by the letter from his owners; and, for that reason, the libel was dismissed. (Record, pp. 57, 58.)

Upon the appeal to the Circuit Court Mr. Justice Hunt affirmed the decree dismissing the libel, but upon grounds totally different from those announced by Judge Blatchford. Justice Hunt says that he *does not concur in the conclusion* "that the authority of the captain was limited and restricted by the letter of his owners, dated December 24, 1870,"

* * * "that it is a letter of advice and counsel,

suggesting what appears to them to be the best modes of relieving himself and his vessel from the difficulties surrounding them;" * * * "*without anything in it which will bear the construction that the captain may not resort to any legal method of obtaining the necessary repairs and supplies for his vessel, according to his best judgment and discretion,*" * * * "leaving it to him to raise the supplies in any manner that the law would permit." (Record, p. 66.) On the authority, however, of the cases of *Stainbank v. Fenning*, (11 Com. Bench, 51,) and *Stainbank v. Shepard* (13 C. B. 418,) Mr. Justice Hunt holds that a recovery cannot be had against this English vessel, because the master did not create a lien by bottomry security. (Record, pp. 67, 68.) He holds, further, that the repairs were necessary for the vessel; that the money was advanced in good faith; that the drafts were not vitiated by any act; and that the libellants may recover on the drafts. In the closing paragraph of his opinion, he says that the case can be carried by appeal to this Court, where the error (if there be one) can be corrected. Findings were filed with the opinion.

A Bill of Exceptions was signed by Mr. Justice Hunt, containing the exceptions taken to his refusal to find as requested, and to the findings made by him; and an appeal was accordingly taken to this Court.

The questions involved in this case are numerous and important—embracing, among others, the right to sue in the admiralty for repairs and supplies (record, p. 6); the right to create a lien upon a vessel for that purpose in any other way than by bottomry (record, pp. 9, 56); the valuation of the cargo (record, pp. 6, 7); and the general authority of the master, as limited by his instructions (record, p. 58); although in the District Court the case was

disposed of solely upon the ground that the master had "exceeded his authority," by the insertion of the words, at the foot of the drafts or bills of exchange, "recoverable against the vessel, freight and cargo."

As matter of fact nothing could be clearer as to the intention of the parties, after all the negotiations had by them upon the subject, than the words insisted upon, and incorporated in the drafts as recited—and without which the appellants say, in the most positive manner, they would not have made the advances (record, pp. 25, 26, 29, 35, 55).

Holding the position he did, Captain Titus, as the sole and only legal representative, in St. Thomas, of the interests of the owners of the vessel, as well as of the owners of the cargo and all concerned, had an undoubted legal right, in avoiding the great expense of a bottomry bond, (which would have cost from 20 to 25 per cent.) (record, p. 25), to preserve to Niles & Co. (as insisted upon by them and the appellants) the lien upon the vessel, &c., which Niles & Co. *originally acquired and never waived*, and upon which only the advance was made. He could bind vessel and cargo by a bottomry bond, and he could certainly take the course which was less expensive to the owners of continuing the maritime lien upon the vessel and cargo, or rather of uniting with Niles & Co. and the appellants, in saying that the vessel might depart from St. Thomas with her cargo without releasing the lien which had already attached. And this compromise measure, or change of security, was for the very purpose of enabling vessel and cargo to reach their destination at the least expense to the owners, and in obedience to their wishes. The power and authority of the master were not limited by any failure on the part of the owners to expressly provide in their letter for giving a lien, because he had it already. It was not

necessary that they should confer it. The master was giving no new or additional right or claim to the appellants. He was only preserving to them the lien which they already possessed, and would not release, and without which clear and unequivocal understanding the vessel would never have been permitted to sail from the port of St. Thomas.

Points.

- I.—The appellants had unquestionably the right to sue *in rem* in the admiralty upon this contract, and were entitled to a decree for their advances.

U. S. Supreme Court Rules, 17.

By the general maritime law, every contract of the master for repairs and supplies, *imports an hypothecation of the ship*; and, *in a case of a foreign ship*, or a ship belonging to another State, *a lien on the ship is created*.

Dunlap's Ad. Pr., 68 (marg. p. 54.)
citing—

The Jerusalem, 2 Gall. R., 349., and
other cases.

The Emily Souder, 17 Wallace R., 666;
8 Blatch. R., 337, 339.

The Acme, 7 Blatch. R., 366.

The James Guy, 1 Ben. R., 112; 9 Wallace R., 758.

The Grapeshot, 9 Wallace R., 129.

There is a lien on a ship for repairs done abroad, without any hypothecation.

Pritchard's Ad. Digest, 227; citing—
Ex parte Halket, 3 Ves. and B., 135; 2
Rose, 194, 229.

It is notorious, that in foreign countries, supplies, and advances for repairs, and necessary expenditures of the ship, constitute, by the general maritime law, a valid lien on the ship; a lien which may be enforced *in rem* in our Courts of Admiralty.

Per Story, J., *The Virgin*, 8 Peters R., 538.

Dunlap's Ad. Pr., 25, citing *De Lovio, v. Boit*, 2 Gall. R., 400.

The principle upon which the owner of a ship is made responsible for necessities furnished to him by order of the master is this, that in the employment of the ship the master is the agent of the owner, and his character and situation furnish a presumption that he has authority from the owner to take all measures that may be necessary for rendering the employment of the vessel efficient and beneficial to his employer.

The Alexander Larsen, 1 W. Rob., 356.
Abb. on Sh. (Marg. p.) 125, Ch. 2, Sec. 2, and notes.

Story Com. on Ag., Sec. 294.

It is agreed on all sides, that the master is to be treated as the general agent of the owner, or employer of the ship, as to procuring repairs and supplies for the ship, in a foreign port, in the absence of the owner or employer: such repairs as are reasonably fit and proper under the circumstances.

Per Story, J., *The Ship Fortitude*, 3 Sum. R., 233.

Every man, who had repaired or fitted out a ship, or lent money to be employed in those services, had, by the law of Rome, and still

possesses in those nations which have adopted the Civil Law as the basis of their jurisprudence, a privilege or right of payment in preference to other creditors, upon the value of the ship itself, without any instrument of hypothecation, or *any express contract or agreement*, subjecting the *ship to such a claim*.

Abbott on Shipping (marg. page) 142, ch. 3, §3.
Conk. U. S. Ad., 55.

In the case of *The Brig Nestor* (1 Sum. R., 73, 81), Justice Story says :

"The lien given by the maritime law, attaches and exists independently of possession, and in this respect resembles the Roman hypothecation (though it is different in other respects), and is often called *facit hypothecation*."

In the case of *The George I. Kemp*, (2 Lowell R., 477, 481,) the Court reached the following conclusion :

"I am of opinion, then, that *it is a question of fact whether credit was given to the vessel*, and the presumption being the same in Massachusetts as by the general maritime law, and the evidence in this case confirming that presumption, that the libellants had severally a lien on the ship."

These advances having been made in the first instance by the appellants, for the very purpose of extinguishing the charges against the vessel, so far as to enable her to proceed and fulfill the voyage, (and not as an act subsequent to the relief of the vessel and her temporary discharge from custody) the endorsement of the bills of exchange carried therewith an assignment of the maritime lien from

Niles & Co. to the appellants, (record pp. 24, 26, 29, 30, 35). According to the theory of the claimants, and in opposition to all admiralty authorities, the vessel being once free from the port where the supplies were furnished, the lien was gone forever, beyond all resuscitation. But admiralty liens are not extinguished in that manner.

From the nature and circumstances of this case, the well known rules regarding bottomry are applicable, as illustrative, and in support of, the appellant's claim: for it was originally intended and agreed that the payment of the advances should be provided for by a bottomry bond, and the repairs were indeed made with that view and expectation.

Marine hypothecations had their origin in the necessities of commerce. They have been said to be "the creatures of necessity and distress." They are of a high and privileged nature, and are held in great sanctity by maritime Courts. "They were intended," said Lord Stowell, "for the purpose of procuring the necessary supplies for ships which may happen to be in distress in foreign ports, where the master and the owner are without credit; and where, unless assistance could be secured by means of such instruments, the vessels and cargoes must perish. It is important, therefore, to the interests of commerce, that bonds of this kind should be upheld with a strong hand."

Conk., U. S. Ad., 198; citing—
The Kennersley Castle, 3 Hagg. R., 1, 7.

Said Dr Lushington, in the case of *The Vibilia*, 1 W. Robinson's R., 1, (cited in note a, p. 198, Conk. U. S. Ad.):

“Where once the transaction is proved to have been clearly and indisputably of a bottomry character, that is, where the distress is admitted or established, the want of personal credit beyond question, and the bond in all essentials apparently correct, then under such circumstances the strong presumption of law is in favor of its validity, and it shall not be impugned save when there shall be clear and conclusive evidence of fraud. * * * It is for the general advantage of the shipping interests of the world that bottomry transactions should not be rendered too difficult. And in ordinary transactions of this kind there is less reason to complain, because the interest of the owner can never be affected, save, as I have already observed, by the act of his own selected agent.”

If the master, factor, purser, or he that is reputed owner of the ship, borrow money on bottomry for the necessities of the ship, such an act binds the owner, *although the money be not so employed, the owner having his remedy against the borrower, whom he so put in trust.*

Pr. Ad. Dig., 70; citing—
Scarborough v. Lyrius, Noy., 95; 14
Viner's Abr., 329.

In this case of the Woodland everything was done under the supervision and with the approval of Capt. Titus, the owners' immediate agent, and evidently with a conscientious regard for the interests of all concerned.

As to advances made for such purposes, the decisions of the Courts, on the ground of the necessities of commerce, have ever been on the side of a wide latitude in favor of the lender: for the reason

Niles & Co. to the appellants, (record pp. 24, 26, 29, 30, 35). According to the theory of the claimants, and in opposition to all admiralty authorities, the vessel being once free from the port where the supplies were furnished, the lien was gone forever, beyond all resuscitation. But admiralty liens are not extinguished in that manner.

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As to advances made for such purposes, the decisions of the Courts, on the ground of the necessities of commerce, have ever been on the side of a wide latitude in favor of the lender: for the reason

that a harsher rule would operate to defeat the voyage.

The facts in the case of the Emily Souder (17 Wallace R., 666), travel in parallel lines with the present one. There the Court say:

“The moneys advanced were not entirely for repairs; but stood in the same rank with necessary repairs and supplies, and equally entitled as security to a lien on the vessel.” * * *
 “Drafts were not received in satisfaction.”
 * * * “It is not necessary that there should be in terms any express pledge of the vessel. The presumption arises that such is the fact.” * * * “Moneys are not usually loaned to strangers, residents of distant and foreign countries, without security, and it would be a violent presumption to suppose that any such course was adopted, when ample security in the vessel was lying before the parties.”

The case of James T. Easton and James McMahon, before this Court in 1878, on a petition for a Writ of Prohibition, is an authority for this case (5 Otto R., 68).

It is therefore apparent that nothing can be clearer than that nice technical distinctions, are not to be indulged as against merchants advances to foreign vessels in distress, but a liberal rule of law should be allowed in their favor. And, besides, the cases of the Acme and the Emily Souder were precisely like the Woodland, except that the latter has the infinitely stronger element of the special precautionary contract, by which a lien, then upon the vessel, freight and cargo, was in the most positive and emphatic terms retained.

As their justification for agreeing to, and making, the advances, what better evidence could the appel-

lants require, than their knowledge that the Bark was at St. Thomas in distress, and in need of the advances asked, to enable her to proceed on her voyage; that her master and owners were without a particle of credit there; that all the expenses incurred had been gone over, item by item, and certified as correct, by the master (record, pp. 36, 56); and that the proposed method of making the advance was the cheapest for the owners (record, pp. 25, 29, 35). And I may add that the almost worthless condition of the condemned portion of the cargo, is strong proof of the serious damages received by the vessel.

According to all authorities, the appellants cannot be held to any responsibility as to the particulars of the accounts between the master and Niles & Co. As third parties, the appellants really have nothing whatever to do with any question of overcharge, if any existed. When they bought the drafts no question or suspicion of any overcharge or unfairness had been raised, suggested or even hinted, and having taken all the usual precautions adopted by and required of merchants in such cases, they should not have been subjected to any delay in the payment of the advances so made. Their fairness or good faith in the matter have never been questioned. It was Niles & Co. against whose charges the objections were made.

But the facts show that the charges were all regular—having been all agreed upon at the outset, between the master and Niles & Co., and afterwards carefully examined in detail by the master, and by him approved as correct. And as an evidence of the fairness of the proceedings, (and to refute any imputation that the interests of the owners were not carefully guarded), it appears that the sale of a part of the damaged portion of the cargo brought so good a price that it resulted in a

loss of \$4,000 to the purchaser, (record, pp. 47, 48); thus saving that amount to the owners, besides the draft for \$1,500, which Niles & Co. returned to the master, for the benefit of the owners, in pursuance of the original understanding between Captain Titus and Niles & Co., as a rebate from the charges to which the latter were justly entitled (record, pp. 29, 30, 36, 54); the two amounts so saved to the owners forming a larger aggregate sum than the drafts in question.

The appellants have brought themselves strictly within the rules which the Admiralty Courts have laid down for the recovery of advances made to relieve the necessities of distressed vessels, and which the appellants took such extraordinary care to preserve and secure by the express lien which they insisted upon holding, and which was conceded to them by the terms upon the drafts "*recoverable against vessel, freight and cargo.*" They should, therefore, be paid their advances.

II. The charges embraced in the accounts were all proper, and are not subject to any deduction whatever.

(a.) The contract between the master and Niles & Co., fixing the value of the cargo at \$125,000, was a special contract; and the commissions of two and a half per cent. for attending to the business of the vessel and cargo; two per cent for storing the cargo; and one per cent. premium for same, were the charges based upon such agreed valuation.

Such charges could not, therefore, be the subject of any increase or reduction. If the value proved to be really greater than the stipulated sum, Niles & Co. could get no more,

and if the value proved to be short of that sum, they were to get no less. Both parties were bound by the sum so fixed, and that was to be the measure and limit of compensation.

This contract is admitted by the answer of the claimants (record, p. 6). Nor is there any pretence that the rate of commissions or insurance was unusual or too high. In this view it is entirely immaterial whether the cargo was in fact worth \$125,000 or not.

- (b) But the cargo was in fact worth quite as much as, and rather more than, the estimated value.

The value agreed upon at St. Thomas was based upon the New York prices current as of that time (record, p. 47), which included duties, and which the Court held to be the proper criterion. Although the market price of some of the goods was testified to at the trial, a considerable portion was not:—most of the witnesses admitting that they did not know the market value as of November and December, 1870.

As to a part of the cargo, the following values appeared:

13,260 hides, 22 lbs. each, at 25½c.,	
gold, per lb. (record, p. 11)....	\$74,378 00
17 bales hair (record, p. 12),	5,119 00
though it would seem there	
must be some error in this last	
amount, as the hair cost \$5,031	
in Montevideo (record, p. 49)...	
109,740 shin bones (record, p. 12)	892 00
	<hr/>
	\$80,389 00
To this add the 300 bales sheep	
skins, averaging 1,000 lbs per	
bale, at 17c. per lb.....	51,000 00
	<hr/>
	\$131,389 00

And this without counting the old copper and other things, worth about \$1,000 more.

The question of the actual value of the cargo was not gone into with much particularity at the trial: the Court holding that the contract was a mutual one between the parties, in which they had agreed in estimating the value of the cargo according to the New York prices current, as of the latter part of the year 1870, to be \$125,000.

While the real value of the 300 bales of sheep skins (1,000 lbs. per bale, at 17 cents per lb.) was \$51,000, one of the claimants' witnesses (Mr. Degener) placed the value at "about \$100 per bale." And because there was less information at the trial in regard to the value of the sheep skins, the claimants undertook to furnish to the Court a certificate from the Custom House showing the invoice value of the sheep skins consigned to C. A. Auffmordt & Co.; and the certificate, which was, after the trial, furnished to the Court (record, p. 49), is remarkable in the fact that it shows that invoice to be missing, and, of course, the value does not there appear, although the importers might easily have supplied the omission by a copy of the invoice from their own books.

But even on the testimony of claimants' witnesses, and the suppression of the sheep-skin invoice, the value of the cargo is shown to be upwards of \$110,389, as follows:

Hides	\$74,378 00
Hair.....	5,119 00
Shin bones.....	892 00
Sheep-skins.....	30,000 00

\$110,389 00

Besides the old copper, &c.

Yet the claimants based the resistance of the payment of these advances, upon the pretence that the agreed valuation of the cargo at \$125,000 was vastly in excess of the true value,—which they alleged did not exceed \$80,000 (record, p. 7), and they averred that if the difference had been no more than \$10,000 or \$15,000, instead of \$45,000 as claimed by them, no objection would have been made to the payment of the advances. In point of fact the value of the cargo was larger than the estimated sum of \$125,000, and, even according to the claimants' testimony, less than the estimated sum by only about \$13,000.

- (c) The insurance was actually effected below the usual rate (record, p. 35), and should be paid.

As to this insurance of the cargo, while it was on shore, awaiting the repairs to the vessel, Capt. Titus would have been derelict in his duty to the absent owners of the cargo, which would otherwise have been entirely unprotected, had he failed to effect an insurance, as a security against possible destruction by fire; and his obligation to the owners of the vessel also required that he should take all reasonable measures to bring the vessel safely to the port of New York, and not come home with an empty ship and an empty purse.

Ordinarily, the master does not represent the cargo, as he does the ship and freight; *but in cases of accidental necessity the law throws this character upon him.*

Conk. U. S. Ad., 199, citing several cases.

In cases of instant, and unforeseen, and unprovided for necessity, the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law. So, if he is driven into a port of necessity, and the cargo is perishable, the master may sell it, as he may also sell the ship in a case of necessity. So, he may sell a part of the cargo, or he may hypothecate the whole cargo and freight, as well as the ship, for repairs of the ship, to enable her to perform the voyage.

Story's Com. on Agency, § 118, and cases there cited.

It was, therefore, the bounden duty of the master to effect an insurance upon the cargo against fire, while it was on shore pending the repairs to the vessel.

- (d) But even if the insurance had been entirely unauthorized, as it was not, the advances which the appellants are entitled to recover, are not subject to any deductions therefor, for the reason that, in reality, the charge of one per cent. for effecting such insurance was not finally made, or rather it was relinquished,—because the concession to the owners of the vessel, by Niles & Co., of \$1,500 of their charges, more than covered the charge for insurance: so that the owners of the bark benefited by the entire amount of insurance, besides \$250 returned to them in the \$1,500 draft. In regard to this draft, the objection taken to it that it was fraudulent on its face, is an absurdity. The balance of charges against the Woodland amounted to \$6,106.24, covered by three drafts of \$2,000, \$2,606.24, and \$1,500, all of which appear,

without any attempt at concealment, in the account rendered to the owners (record, p. 39). This third draft of \$1,500, was not so much of an additional charge against the vessel, but being a part of the amount earned and properly recoverable against the vessel, a return to the owners of that amount was a generous deduction or allowance made by Niles & Co. in favor of the Woodland's owners.

III.—The point cannot be sustained, which was taken by the claimants, that there can be no recovery under this libel, for anything except actual supplies to the vessel. No such limitation exists. ¶ The vessel is primarily responsible for all the charges incurred, and if anything should be contributed by the owners of the cargo, the owners of the vessel can look to the owners of the cargo for contribution. This primary responsibility was held in the case of *The Othello*, and in other cases. In that case the schooner *Othello* was under charter to the United States Government, and, at the conclusion of the war, was laden, at Wilmington, N. C., with a cargo of captured arms, valued at \$188,000, and departed on her voyage to New York. She put into St. Thomas in distress, and it became necessary, as in this case, to discharge and store the cargo, while the necessary repairs were being put upon the vessel. For attending to such business G. W. Smith & Co., of St. Thomas, charged a commission of 2½ per cent. upon the above value of the cargo, and also two per cent. for the storage of the cargo while on shore, precisely the same rate of commission as charged to the Woodland—and the whole was included

in the bill, to cover which a bottomry bond was executed by the master. A libel was filed in New York against vessel and cargo, upon the bottomry bond, and was dismissed as against the cargo, because the latter was the property of the United States, the sovereign power, but *the libellants obtained a decree against the vessel for the entire amount.*

But while the vessel is responsible for services rendered in behalf of the cargo, under such circumstances, yet the commissions of 2½ per cent. and 2 per cent., charged upon the value of the cargo, were not for services rendered or charged to the cargo, but to the distressed vessel, and for the purpose of enabling her to carry her cargo to the port of destination, and earn freight; and the value of the cargo was only adopted as a basis upon which the charges were to be predicated or ascertained, for attending to the vessel's business, and getting her ready for sea. It was an utter impossibility to repair her damages, and fit her to pursue her voyage, without first taking her cargo out. Therefore every service, incident to that purpose, was a proper charge against the vessel.

In a similar case (*The Yuba*, 4, Blatch. R., 352), said Judge Nelson :

“The objection, that the repairs were made before the loan was effected, and, hence, that the loan was not necessary in order to procure the repairs and enable the vessel to proceed on her voyage, is not tenable. The repairs were made upon the credit of the vessel, and the loan was indispensable to relieve her from the charges.

The discharge of the cargo became necessary to enable the surveyors to ascertain the extent of the damage, and the ship master to make the repairs. That service was incidental to the repairs, and without it they could not be made, and, hence, the stevedores' bill was a proper charge. So, in respect to the commissions for the procurement of the loan. They were incidental to the loan itself, as it could be raised, in the given case, only through an agency."

The same doctrine was held in the case of *The Virgin*, 8 Peters' R., 538, and *The Emily Souder*, 17 Wallace R., 666.

IV.—The master had authority to pledge his vessel for necessities, in the form he adopted, and it was not requisite that he should employ a formal bottomry, in order to give a lien upon the vessel for necessities.

The District Judge, in reviewing the law of Great Britain, from the time of Charles II. in reference to the authority of the master of a British vessel, in a foreign port, to pledge his vessel for necessities, said, that by the general maritime law and the civil law, an implied lien therefor existed, and that it extended to all vessels, foreign and domestic; and the Courts of Admiralty of the United States always took cognizance of suits *in rem* founded on such implied liens for supplies and repairs, in the case of foreign vessels. By the statute, August 7, 1840, 3 and 4 Victoria, Chap. 65, § 6, jurisdiction was given to the High Court of Admiralty to decide all claims for necessities supplied to any foreign ship or sea-going vessel, and the Courts of Admiralty of Great Britain hold that this provision gives a mari-

time lien on a foreign vessel for necessities supplied in a British port, which can be enforced in admiralty against the vessel. (The *Ella A. Clark*, 8 Law Times Rep., 119; The *Two Ellens*, Law Rep., 3 Adm. and Eccl., 344, 354, and on appeal in the Privy Council, Law Rep., 4 Privy Council Appeals, 161 to 167.)

If a Danish vessel were in an English port, under such circumstances as those disclosed by this case, she could be there held under the statute of 3 and 4 Victoria. So, also, this Bark *Woodland*, being owned in St. John, N. B., and not in England or Wales, is ~~is~~ to be treated as a foreign ship.

On the 17th of May, 1861 (24 Victoria, Chap. 10, § 5), it was enacted that the High Court of Admiralty should have jurisdiction over any claim for necessities supplied to any ship elsewhere than in the port to which the ship belonged, in case the owner of the ship was not domiciled in England or Wales. "The distinction adopted by the law of England, which requires an express hypothecation *for repairs of a ship in England*, does not take place as to repairs done abroad, and *Ireland, Jersey and Guernsey* are foreign countries for that purpose." (*Hussie v. Christie*, 13 Ves., Jr., 599; 9 East., 426; 3 Swanton, 139.) The *Woodland's* owners being domiciled in St. John, N. B., and not in England or Wales, brought her within the provisions of the 24th Victoria. And in commenting on these English statutes, the District Judge cites several cases as his authority for saying that *the debt for necessities becomes a charge on the ship when a suit in rem therefor against the ship is instituted*, and he does not deny that the High Court of Admiralty in England would take jurisdiction of a suit *in rem* against this British vessel, to enforce the lien claimed in this case for necessities supplied to such vessel in the Danish port of St.

Thomas ; nor does he deny that jurisdiction in such a case cannot be exercised by the Admiralty Courts of the United States.

The cases cited at the trial as holding an opposite doctrine to that here maintained, and which were referred to by Mr. Justice Hunt in his opinion, were not like the case at bar.

The case of *Stainbank v. Fenning* (11 Com. Bench, 51) was on a policy of insurance by C. Stainbank & Son. There was a special hypothecation, by the terms "Have pledged, mortgaged and hypothecated, and by these presents do" pledge, &c., vessel, freight, &c. The merchant had no insurable interest in the ship, because the payment of the money borrowed was not made to depend upon the arrival of the vessel. The vessel was lost. And in that case the Court (Jervis, J.,) made this declaration : "It has been said that if the lender does not choose to take upon himself the risk of the ship's return, and will be content not to demand maritime interest, the master may pledge both the ship and the personal credit of the owner." That is exactly the case of the *Woodland*, and it is a citation in our favor rather than against us. He says, further, "Where the master professes to hypothecate the ship, and also to pledge the credit of his owners, the Court of Admiralty will reject that part of the instrument which is directed to the latter object, and proceed *in rem* against the ship." That action was not brought to recover for the advances.

Also in the case of *Stainbank v. Shepard*, (13 Com. Bench. 417,) it was held that the master had no authority to hypothecate, and by the same instrument pledge the personal credit of the owner for advances, but a bottomry bond might be given at the same time with, and as collateral security for, bills drawn on the owners for money borrowed ; but in that case the vessel having been lost, and no transfer of

property having been effected by the instrument, the merchant had no insurable interest in the ship.

Both of these cases support the appellant's case, and are exactly the reverse of what is claimed by the appellees as established by them.

And yet it is upon the authority of these very cases that Justice Hunt affirmed the decree of the District Judge, while at the same time the former differed from the latter, entirely, upon the ground on which the latter based his decision, to wit: that the master had not followed the instructions contained in the letter from his owners.

This is no such case as the *Stainbank's*. *There was no pledge of the personal credit* of Turnbull & Co. here given by Captain Titus. Captain Titus, after the agreement with the appellants, merely drew the drafts, as he might do, and, as a precaution against the failure to pay, (which proved to be a wise precaution on the part of the appellants,) there was a reservation or continuance of the lien, which attached at the time the repairs and advances were made. The drafts, as evidence of the maritime lien, were to follow the bark to New York, and on failure of payment the continuing maritime lien was to be enforced, as it was enforced, by legal process. The claimants, by the exceptions interposed in this case at the outset, raised the objection that the appellants acquired no lien upon either vessel, freight or cargo. (Record, p. 5.) But upon the argument of those exceptions, the District Judge swept away such objections. He overruled the exceptions, and held that the drafts did bind the bark as alleged.

It is claimed that there is no such thing as a maritime lien for advances made to a foreign vessel in distress, unless it be by a written form of hypothecation which puts the debt at the risk of the lender, and makes its payment to depend upon the safe ar-

rival of the ship. If the bottomry bond had been insisted upon that would have carried with it the payment of marine interest—the very thing which the owners were so strenuous in their instructions to avoid incurring—and it was at their special and earnest request that the parties at St. Thomas forbore to exact this marine interest on a bottomry bond, and thus saved to the owners \$1,373.91, being the difference between 25 per cent. marine interest on the three drafts, (\$1,526.56,) and the $2\frac{1}{2}$ per cent. discount charged on these drafts (\$152.65.) (Record, p. 39.)

In the case of *The Pacific* (Browning and Lushington Ad. R., 243) it was held:

“Under the 5th section of the Admiralty Act of 1861, the material man acquires no maritime lien, but only a right to sue the ship; his claim against the ship accrues only upon his institution of the suit, and is therefore subject to any registered mortgage at the time subsisting on the ship.” Dr. Lushington: “From 1835 to 3 and 4 Victoria, ch. 65, §6, the material man had no lien. By the latter statute jurisdiction was given over claims for necessaries supplied to a foreign ship; but that statute not applying to British ships, the 24th Vic., ch. 10, §5, gave jurisdiction over claims for necessaries supplied to any ship, subject to two provisos—that the supply should have been made elsewhere than in the port in which the ship belongs, and at the date of the institution of the suit the ship owner should not be domiciled in England or Wales.” That was a question of priority of mortgage over a claim for supplies.

In the case of *The Two Ellens*, (Law. Rep. Ad. & Ec., vol. 3, p. 357,) Sir Robert Phillimore says: “In the *Bold Buccleugh*, (7 Moo. P. C., 267,) a case which is supported by the judgment in *The Europa*, the Privy Council said: “A maritime lien is well

defined by Lord Tentenden to mean a claim or privilege upon a thing, to be carried into effect by legal process; and Mr. Justice Story explains that process to be a proceeding *in rem*, and adds, that whenever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding *in rem*, and, indeed, is the only court competent to enforce it. A maritime lien is the foundation of a proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and, whilst it must ~~must~~ be admitted that where such a lien exists a proceeding *in rem* may be had, it will be found to be equally true that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process. This claim or privilege travels with the thing into whatsoever possession it may come." The case was a question of priority in favor of a mortgage.

In the same case of *The Two Ellens*, on appeal in 1872, (4 Privy Council App., 161,) Lord Ch. J. Mellish said: "Dr. Lushington appears to have determined that a maritime lien was created from the time the supplies were furnished, but afterwards in the case of *The Pacific* he determined that no lien was created until the suit was commenced. Previous to 3 and 4 Vic. the supply of necessities did not give any maritime lien on the ship. *Held*: That the *res*, the ship, does not become chargeable with the debt for necessities until the suit is actually instituted."

The *Pieve Superiore*, on appeal from the High Court of Admiralty (5 Law R., Privy Council Appeals, p. 482), held: "The Admiralty Court Act, 1861, being intended to remedy a grievance by amplifying the jurisdiction of the English Court of Admiralty, ought to be construed liberally, so as to afford

the utmost relief which the fair meaning of its language will allow."

The case of the proceeds of the *Albert Crosby* (Law R., Adm. & Ec., vol. 3, p. 37), in the High Court of Admiralty in 1870, was in many respects like the *Woodland*. The bark *Albert Crosby*, of Nova Scotia, was in the Thames, and Messrs. Brown, shipwrights at Rotherhithe, executed certain repairs to the bark, at the master's request. Messrs. Brown refused to allow the bark to leave their dock until their bill for the repairs was paid. The master had no funds to pay the bill, and applied to plaintiff to lend him the money to pay it; the plaintiff accordingly lent the master £215, which the master paid to Messrs. Brown. The vessel then sailed for Melbourne. The bark was afterwards sold, under an order of the Court of Admiralty, and an order was asked directing payment of the amount due, out of the fund in the registry of the Court, arising from the sale. It was so ordered, in an opinion by Sir Robert Phillimore.

Ex parte Michael (7 Queen's Ben., Law R., p. 658), decided in 1872, is to the same effect.

V.—The master's authority was not limited by the letter from the owners, in any degree sufficient to exclude him from acting under his general authority.

This is fully and emphatically affirmed in the opinion delivered by Mr. Justice Hunt (record, p. 66). Reference is also made to Story's Com. on Agency, §§ 127, 128, 294, and cases there cited: Abbott on Sh. marg. p. 125, ch. 2, § 2, and notes; Pritch., Ad. Dig., 222.

The letter from Turnbull & Co. will not bear any such interpretation as is put upon it by the District

Judge. The owners merely *expressed the opinion* that the master would be able to obtain his funds cheaply through drafts on Heaney & Parker, by reason of their having written to him and to G. W. Smith & Co., and thus avoid the great expense of bottomry; and then they suggested that perhaps it could be done better by drawing on them. Here, certainly, is no *DIRECTION to the master to only draw simple drafts or give a bottomry*, but they impress upon him, above all things, the importance of "avoiding the great expense of a bottomry," and suggest the hope that he may be able to do so by giving drafts on the owners. They do not forbid him to give drafts which shall retain the maritime lien (which had already attached, and which no one could take away from the appellants), or say that if he does do so they will not pay; but after indicating their wishes, (the strongest of which was to avoid a bottomry), the very next words of their letter are: "*We will merely add that we hope you will use your best judgment and your best exertions for the interest of all connected*" (record, p. 40, 55): thus giving him the widest latitude of discretion, and that, after impressing upon him that he is so far away they can give him "*no positive advice*" (record, p. 40, 55), and he had simply to do his duty (record, p. 40, 55). No one in St. Thomas would trust Turnbull & Co. or Heaney & Parker, for a dollar, not even the firm of G. W. Smith & Co., to whom the owners specially referred (record, p. 26, 29). Simple drafts, therefore, being out of the question, and the owners imploring Capt. Titus to avoid the expense of bottomry, and requiring him to use his best judgment and his best exertions for the interest of all concerned, in an honest and conscientious fulfilment of his duty, and the "best" thing he could do, he "drew" the drafts in question "on" his owners, "payable in New York, in gold," just as

they required. It would have been difficult for him, under the circumstances in which he was placed, with that letter before him, to do differently from what he did. In fact he did carry out the instructions of the letter.

The district judge in effect admits, as it was proven on the trial, "that a resort to bottomry would have been more expensive to the claimants," and that the master really did that which was "*for the interest of all concerned*;" but he reaches the erroneous conclusion that the master exceeded "his authority as defined and limited by the letter" (record, p. 58).

But if by any refinement of reasoning, the letter of Turnbull & Co. should be susceptible of any such intended limitation of authority as there held, it is a sufficient answer to say that it is evident no such meaning or interpretation was given to the letter by any of the parties concerned in it at St. Thomas—either Captain Titus, Niles & Co., or the appellants, but was acted upon by them all, under the fullest belief that the master's power to do what was proposed, had not in the least been impaired by the letter. The lien was fully understood to continue. If any doubt had been raised, or if the appellants had not entire confidence that the master possessed the fullest power and authority to do what he did, they would never have advanced \$4,600 for the paltry discount of $2\frac{1}{2}$ per cent., the smallest discount allowed on the best and safest of bills. And in that view of the case, the master having the general authority to do what he did, such general authority cannot be limited, except by terms so manifestly clear and positive as to admit of no mistake, and made known to and understood by the party to be affected, at or before the time when the transaction was completed. If the affected party is misled in the belief as to the master's authority under

special instructions, it is the same as if such special instructions were never disclosed: for to act as a limitation upon the master's general powers, the special instructions must not only be disclosed, but palpably, upon their face, they must show the limitation, in a manner not to be misunderstood. Otherwise special instructions might be purposely worded so as to act as a trap and deceit, and work the greatest wrong to innocent merchants. That is the doctrine laid down in cases cited.

It is, however, a great mistake to suppose that Captain Titus *created a lien against the vessel* by making the drafts. He did no such thing. The obligation had been already incurred, and the right to the maritime lien existed, and had already attached against the bark Woodland, before the letter of Turnbull & Co. arrived at St. Thomas on the 11th of January: for the bark arrived there in the previous month of November, and when the letter came, on the 11th of January (record, pp. 41-48, 55), the repairs had been made and expenses incurred, and the mode of payment therefor by bottomry bond agreed upon; but, when the letter arrived, in deference to the wishes of the owners, the change was made, *to save the 20 or 25 per cent. marine interest*, the parties stipulating that the lien, however, should be preserved. Therefore, if the letter had been intended to change the status of the parties it came too late. Hence, the drafts, as drawn, worked an assignment to the appellants of the lien already on the vessel and cargo.

The drafts were made no better and no worse by the added words. They constituted no claim which was not already possessed, and were in fact surplusage and inoperative, as the mere evidence of a pre-existing fact. Their only possible object or office was a manifestation of the intention, that under no circumstances whatever should the mari-

time lien be released by the acceptance of the drafts and permitting the vessel to sail. The appellants held the vessel in their power, and no one could deliver her from them, without their consent until they were paid the uttermost farthing.

VI.—The fact that both parties to this contract are foreigners, is no reason why the Court should refrain from entertaining jurisdiction of the case.

The law of this case is international law: it is coextensive with almost all the maritime nations of the earth, and is well settled. But moreover, these appellants, who are Danish subjects, were in a Danish West India port, where they had the custody and control of this British vessel, (with the power to wring from it the payment of the last remnant of indebtedness before parting with such actual custody and control), and there they entered into a most solemn contract with the master of this British vessel, by which it was understood and agreed, between all the parties, that the contract should be performed at the port of New York, as suggested by the owners; that being the original port of destination, where the vessel was then bound, and where she afterwards safely arrived (record pp. 23, 40). New York was to be the place where the contest must come, if any contest should arise over the payment of these advances. And it was never contemplated that these parties should go elsewhere for the redress of their grievances. It is respectfully submitted that there is no reason, or propriety, or justice, in saying that these Danish subjects should go all the way from the West Indies to New York, and then afterwards to the Courts of the vessel's country—England—in

the pursuit of their rights ; but it would be manifest injustice to require them to do so. It is exactly what the appellants said they would not undertake to do, but that they should hold their lien upon the vessel and cargo. They did not know the owners, and they would relinquish nothing, except to permit the vessel to sail. The vessel with her cargo was bound to New York, where the cargo was owned, the latter being in value ten times as much as the former ; and these bills of exchange, *made payable in New York, ten days after sight*, were made a continuing lien upon the "cargo," as well as upon the vessel and freight. Upon the failure to honor these bills, where had the appellants a better right to seek redress than at New York, where the vessel and cargo then lay, subject to the stipulations of the broken contract ? In advancing this money they had a right to suppose that the well established principles of maritime law governing such cases were a guaranty of their rights, to which they could confidently look for protection, in case such a necessity arose.

It has already been shown that this case is covered by the laws of Great Britain. But if it were not so, that would make no difference in the determination of the rights of the appellants, for the reason that the law of this country must govern, because the contract was to be performed at the port of New York, and the parties were not of the same country, but one was Danish and the other English.

In the opinion of the District Judge (record, p. 58) the case of *Pope v. Nickerson* (3 Story, 465) was cited. And in that case it is held, that "The validity, nature and interpretation of contracts is governed by the law of the place where they are to be performed, unless they are void by the law of the place where they are made." It cannot be pretended

that there is anything in the law, in force, either at New York or St. Thomas, which forbids or interferes with the recovery claimed in this case.

In the case of *Arayo v. Currel* (1 Louis R., 528). Martin, J., in delivering the opinion of the Court, says: "Now, if there be a principle better established than any other on the subject of the conflict of law, it is, that contracts are governed by the laws of the country in which they are entered into, unless they be so with a view to a performance in another. Every writer on that subject recognizes it. Judicial decisions, again and again, through the civilized world have sanctioned it." * * * "Whoever contracts in a particular place, subjects himself to its laws, as a temporary citizen. The idea that the law of a man's domicile follows him through the world, and attaches to all his contracts, is as novel as unfounded."

But the case of "*The Zolverein*" (2 Jurist, Part I., new series, p. 429) is exceedingly apposite. The Merchant Shipping Act, 17 and 18 Vic., Chap. 104, §§ 296, 298 and 299, provided that if a ship did not port her helm and a collision occurred, such ship could not recover for any damage sustained. The English ship *Pet* did not port her helm. A collision occurred off Flamborough Head. The *Zolverein*, a foreign vessel, was pronounced in fault by the Trinity Masters. She sought to avoid responsibility under the English statute. Held, that the 17 and 18 Vic., Chap. 104, did not apply to cases in which foreign vessels were concerned, and that, therefore, the general maritime law must prevail, and the British vessel was entitled to be recompensed for the damage she had sustained. In that case Dr. Lushington says: "I will state what Mr. Justice Story says, as reported in the case of *The General Steam Navigation Company v. Guillon* (11 M. and W., 877). 'In regard to the rights and

merits involved in actions, the law of the place where they originate is to govern ; but the forms of remedies, and the order of judicial proceeding, are to be according to the law of the place where the action is instituted, without any regard to the domicil of the parties, the origin of the right, or the country of the act.' * * * "The power of this country is to legislate for its own subjects all over the world, and as to foreigners within its jurisdiction, but no further." * * * "When a collision takes place on the high seas, between a British vessel and a foreign ship, the question which arises is, by what law should such a case be determined if a suit be brought in the Court of Admiralty ? So far as relates to a foreign vessel, the answer, I apprehend, is not difficult : it must be tried by those rules of navigation which prevail generally among maritime nations navigating the seas where the collision takes place." * * * "I must, as to the foreigner, determine by the maritime law only, and not by the statute law of Great Britain."

In addition to showing that the claim of the appellants is sustained by the laws of this country, we have also shown that it is sustained by the law of Great Britain, the vessel's flag. And it appears, besides, that the law of the place where the contract was made likewise covers the case. The law of Denmark (December 28, 1792, Sec. 2), is that the master may procure money on bottomry, or in a less expensive way, for the necessary expenses of the vessel and to the furtherance of the voyage, and that such claims "shall in common with bills of bottomry be covered in advance, before the division of the estate, by the freight, the vessel with appurtenances and the goods on board."

The Danish law upon the subject is more fully

stated in the document on file in this cause as follows:

Summoned to give my opinion about the following questions, viz:

“Does the Danish Law give a lien against a
“foreign vessel in a Danish port for materials
“or supplies furnished to her to relieve her
“necessities? or: Was there a maritime lien
“created under the Danish Law against the
“British bark Woodland for supplies furnished
“to her in a Danish port to relieve her necessities
“or distress and enable her to proceed on
“her voyage?”

I shall declare the Danish law to be:

When a master of a ship, whether Danish or foreign, receives money in a Danish port for the purpose of supplying his ship with materials or other necessities, the owners of the ship are bound to pay the debt. Nevertheless, the owners are not responsible for such a debt with their whole fortune, but solely with the ship and freight, confided to the master. The creditor has accordingly a right to arrest the ship, and after having obtained judgment over the master or the owners, to make execution in ship and freight in order to get payment for his claim.

It follows from what is said, that if the British bark Woodland has received supplies furnished to her in a Danish port, the creditor, who had a fair claim, would be entitled to arrest the ship and after judgment to proceed to her sale.

Copenhagen, the 17th September, 1881.

A. HINDENBURG,

Barrister of the Supreme Court of Denmark, Dr. juris.

[SEAL]

I, CARL CHRISTIAN BIRCH, holding by Royal Authority the office of King's bailiff for the City of Copenhagen, and being in my said capacity charged with the execution of judgments and arrests in civil cases, do hereby certify that the opinion given in the above declaration by Mr. A. Hindenburg, LL.D. and barrister at the Supreme Court, on the questions therein contained, is in every respect in conformity with the Danish law and practice.

Copenhagen, September 17th, 1881.

[SEAL.]

CARL BIRCH.

UNITED STATES CONSULATE, {
Copenhagen. }

I, HENRY B. RYDER, Consul of the United States of America, at Copenhagen, Denmark, do hereby certify that the above signature and seal of Carl Birch, King's Bailiff, to the instrument in writing thereto annexed, are true and genuine, and as such entitled to full faith and credit.

In testimony whereof, I have hereunto
subscribed my name and affixed
my seal of office, this seventeenth
day of September, 1881.

HENRY B. RYDER,

[SEAL.]

U. S. Consul No. 19.

VII.—As strict matter of law, the appellants were entitled to a recovery; but if for any reason, there was a failure of legal right, they were then equitably entitled to recover: because Admiralty Courts act upon the equities of the case.

Said Mr. Justice Story, in the case of *The Virgin*, (8 Peters' R., 550), "Admiralty Courts are not governed by the strict rules of the

common law, but act upon enlarged principles of equity." There are many authorities to this effect, but it is only necessary to cite the *Augusta*, 1 Dod R., 283 ; *The Tartar*, 1 Hagg. R., 169 ; *The Nelson*, *ibid.*, 176.

The appellants felt entirely satisfied that they were fully protected, and their rights preserved beyond all question, by the carefully worded stipulation in writing insisted upon by them.

They were unwilling to risk \$4,600 in gold, on what might appear to be a doubt of their getting it back, especially where the consideration was so small as \$115, the regular mercantile discount.

VIII.—The appellants are entitled to have a decree reversing the decree of the Circuit Court, whereby the decree of the District Court was affirmed, dismissing the libel with costs, and are entitled to have a decree for the amount claimed and set forth in the libel, with costs.

Justice Hunt says : "If this vessel had sailed under the flag of the United States, and her master had been a citizen of the United States", the appellants would unquestionably have been entitled to a decree in their favor (record, p. 67). He puts the case entirely upon the fact that the vessel carried the English flag. But it has been fully shown that that fact does not make any difference in the rights of the appellants.

EXCEPTIONS.

The 1st, 2d, 3d and 4th exceptions contained in the bill of exceptions are to the refusal and omis-

sion of the Judge before whom the cause was tried on the appeal in the Circuit Court, to find as proposed by the libellants, and these exceptions should severally be sustained.

The 5th exception is, that upon the case as presented upon the pleadings and proofs in the Circuit Court, the Judge did not direct that the decree dismissing the libel, with costs, should be reversed, and a decree be entered in favor of the libellants for the amount claimed and set forth in the libel. The 8th Point covers this.

The 6th exception is that the libellants except, separately, to ~~be~~ the following findings of fact in said Judge's findings of fact, as not only contrary to the evidence, but without any sufficient or legal evidence to support them :

1. His finding as of fact to the effect that the letter of the claimants, received by Capt. Titus at St. Thomas on January 11, 1871, was so received before any advances had been made by the libellants: instead of finding that the advances in question for the necessities of the said bark had been made or incurred prior to the receipt of said letter.

The proofs show conclusively, as recapitulated in the opinion of the district judge, that all of the repairs had been made, and bills incurred, prior to the receipt of the letter. It is true that the libellants had not then made the advances for the discharge of the claims held by Niles & Co., but upon making such advances the libellants became subrogated to all the rights against the vessel, freight and cargo which were held by Niles & Co. This exception is covered by the 1st and 3d points.

2. His finding as of fact that as to the insurance, none was actually effected, and that the commis-

sions were on an excessive valuation: instead of finding that the insurance was effected by J. Niles and Co., and the commissions were on a proper valuation.

The proofs are very clear that the insurance was effected, and that the commissions were on a proper valuation. This exception is covered by the 2d point.

3. His finding that the third draft was given by Niles to the master, upon a corrupt understanding that it was to be his share: instead of finding that the third draft formed a part of the proper charges of J. Niles & Co. against the said bark, but which by previous arrangement with the master was to be returned to him, to be delivered up to the owners of the bark, as a concession or deduction from the proper charges of said J. Niles & Co.

There was not one particle of testimony in the case to sustain this finding. An attempt was indeed made, on the trial in the District Court, to introduce some such testimony, but it was ruled out. After an appeal had been taken to the Circuit Court, and the cause was upon the calendar awaiting argument, and when under the rules of the Court it was too late to take further testimony, the claimants took the deposition of Archibald T. Heaney, but under libellant's objection. Upon the hearing of the case on appeal in the Circuit Court, claimant's counsel offered to read that deposition, under objection by counsel for the appellants, and Mr. Justice Hunt ruled such deposition out. Such ruling is final and conclusive (see bill of exceptions, p. 63). The claimants took no exception to that ruling.

The question covered by this exception is embraced in the 1st Point.

4. His finding that by the law of Great Britain, the master of a British vessel had no implied authority, even when in a foreign port, to pledge his vessel for necessities, or create a lien thereon, by any other form of hypothecation than a formal bottomry bond, and that the master of this vessel had no such authority, either express or implied: instead of finding that the master of this vessel had authority to pledge his vessel for necessities, or create a lien thereon in the form which was adopted by the master.

This exception is embraced in the 4th Point.

The 7th exception is that in view of the facts found, that the claim made in the libel cannot be maintained, because the vessel was a British vessel: that it is wholly immaterial, to relieve the claimants from payment of the advances to the distressed vessel, whether she was British or American, inasmuch as the contract was made in a Danish port, to be performed at the American port of New York, where the vessel was bound, where her cargo was owned, where she safely arrived, and where she was libelled for non-performance of the contract; and therefore the appellants excepted to the assumption of such findings of the Court of such materiality.

The 8th exception is that the appellants except to the conclusion of law, as found by the Court, that no lien was created on the bark *Woodland* or her freight by the drafts recited, and to the conclusion that no lien existed thereon in favor of *Niles & Co.*, as unwarranted by the facts as found by the Court, so far as sustained by any evidence.

The ninth exception is that the libellants except to said conclusion of law last mentioned, as unwarranted by the facts as found by the Court.

The tenth exception is, that the appellants except to the conclusion of law, found by the Court, to the effect that the accounts and dealings between Niles & Co. and Titus, the master, were of a fraudulent character, and that the same do not in law create a lien upon the vessel or the freight, as unwarranted by the facts as found by the Court, so far as sustained by any evidence.

There is no evidence in the case to sustain such conclusion, and in fact not one particle of evidence showing any fraud whatever; and the allusions to fraud are therefore utterly without any foundation or support.

The eleventh exception is, that the libellants also except to said conclusion of law, as unwarranted by the facts as found by the Court.

The twelfth exception is, that the appellants except to the conclusion of law found by the Court, that the decree of the District Court should be affirmed. with costs.

JAMES RIDGWAY,
Proctor and of Counsel for Appellants.

W R Beebe
of Counsel for Appellants



UNITED STATES SUPREME COURT.

J. H. FECHTENBERG ET AL.,

Libellants and Appellants,

VS.

THE BARK WOODLAND AND FREIGHT, WM. W.
TURNBULL ET AL.,

Claimants and Appellees.

BRIEF FOR APPELLEES.

HENRY J. SCUDDER,

Of Counsel for Appellees.

United States Supreme Court.

J. H. FECHTENBERG ET AL.,
Libellants and Appellants,

VS.

THE BARK WOODLAND AND FREIGHT.
WM. W. TURNBULL ET AL.,
Claimants and Appellees.

BRIEF FOR APPELLEES.

STATEMENT OF FACTS.

The libel was filed against the British bark Woodland, her cargo and freight (Record, p. 1), but by stipulation process was waived upon a claim to the vessel and freight only, being filed (p. 3).

The claim of the libel was to enforce as admiralty liens on the vessel, cargo and freight, certain advances alleged to have been made on the credit of the vessel by J. Niles & Co., at St. Thomas, for which the master drew two drafts, one for \$2,000, the other for \$2,606.24, "whereby he pledged the said vessel, freight and cargo for the payment of the same." The libellants allege that they are the owners of the said drafts, and that J. Niles & Co. assigned to them the demand for said advances and the *lien* therefor upon the bark, &c. (p. 1).

The answer of the owners of the vessel and freight denied the existence of any lien, and alleged that a large part of the alleged advances were made for the purposes of the cargo, and neither vessel nor freight were liable for them (p. 6). By an amendment to the answer, the claimants charged a conspiracy between Niles & Co. and the master, by which it was fraudulently agreed

that the charges were to be fraudulently increased, and that Niles & Co. and the master were to share therein (p. 8).

The case was tried before Judge Blatchford in the U. S. District Court, and his opinion is printed at p. 52.

He dismissed the libel on the ground that the master had express instructions from his owners which were communicated to Niles & Co. and to the libellants (p. 58).

The Circuit Court heard the case on appeal on the same proofs as given in the District Court (Record, p. 63). Claimants proctors offered in evidence further proofs taken in the Circuit Court, but the Court excluded them and claimants excepted (p. 63). This proof consisted of the deposition of Mr. Heney, showing the conduct of the master (p. 59 to 61).

The findings of the Circuit Court are at page 64, and the Opinion at p. 65.

The Circuit Court affirmed the decree of the District Court, but upon a different ground, viz.: that the master of this British vessel had no authority to create a lien upon her except by an express hypothecation.

POINTS.

I. The findings of fact by the Circuit Court are conclusive, and no examination of the evidence will be made by this Court.

The Benefactor, 102 U. S., 218.

See Amendment to Rule 8, 103 U. S., p. XIII.

But a comparison of the libellants' requests to find, with the proceedings of the Court, will show but little difference between the two, and that difference is in the legal conclusion incorporated in the request, rather than in the facts.

II. The only noticeable exceptions in the case, if any may merit attention, are the 8th, on p. 69, 9th, 10th and 11th, on p. 70.

(a) It certainly needs little argument to support the conclusion drawn from the facts found.

That the libellants were the *bona fide* holders of the drafts drawn upon the owners (see Drafts, p. 27), could not give them the benefit of a lien, unless the person undertaking to *create* the lien had the power to do so, and the defect of power being found, the lien failed (p. 65).

III. But the finding of want of authority was fully authorized.

(a) The law of the flag was the limit of the implied authority of the master. All persons dealing with the master were put upon notice by the flag.

Lloyd vs. Guibert, 6 Best & Smith, 117.

Pope vs. Nickerson, 3 Story, 475.

King vs. Sarria, 69 N. Y., 32.

(b) The Court has found what the English law is (5th finding, p. 65), and this finding is conclusive.

Besides, it is justified by authority.

Carrington vs. Pratt, 18 How., 63.

Am. Ins. Co. vs. Costar, 3 Paige Ch., 329.

Castinque vs. Imbrie, House of Lords, 39 L. J. N. S., 356.

The Two Ellens, 41 L. J. N. S., Ad., p. 33.

S. C. on Appeal, L. R. 4, P. C. 161.

The Emancipation, 1 W. Rob., 124, 130.

(c) Beyond the above considerations, the finding of fraud in the inception of the contract vitiates the whole, and this Court will not lend any aid to its enforcement.

Carrington vs. Pratt, 18 How., 63.

S. C., 1 Curtiss C. C., 340.

The Sampson, 4 Blatch., 28.

IV. Courts of Admiralty have uniformly held that liens of the character attempted to be claimed here, are not transferable.

Patchin vs. Stbt. Patchin, 12 L. Rep., p. 21.

The Bark Geo. Nicolaus, Newberry, 449.

Logan vs. Stbt. Æolian, 1 Bond, 267.

Freestone, 2 Bond, 234.

Reppert vs. Robinson, Taney's D., 492.

Harris vs. Sch. Kensington, 8 Am. Law Reg., 152.

The Champion, 1 Brown Ad., 535.

The same doctrine has been held by the State Courts in regard to liens given by statute to material men.

Pierson vs. Tincker, 36 Mo., 384.

Hays vs. Stbt. Columbus, 23 Mo., 233.

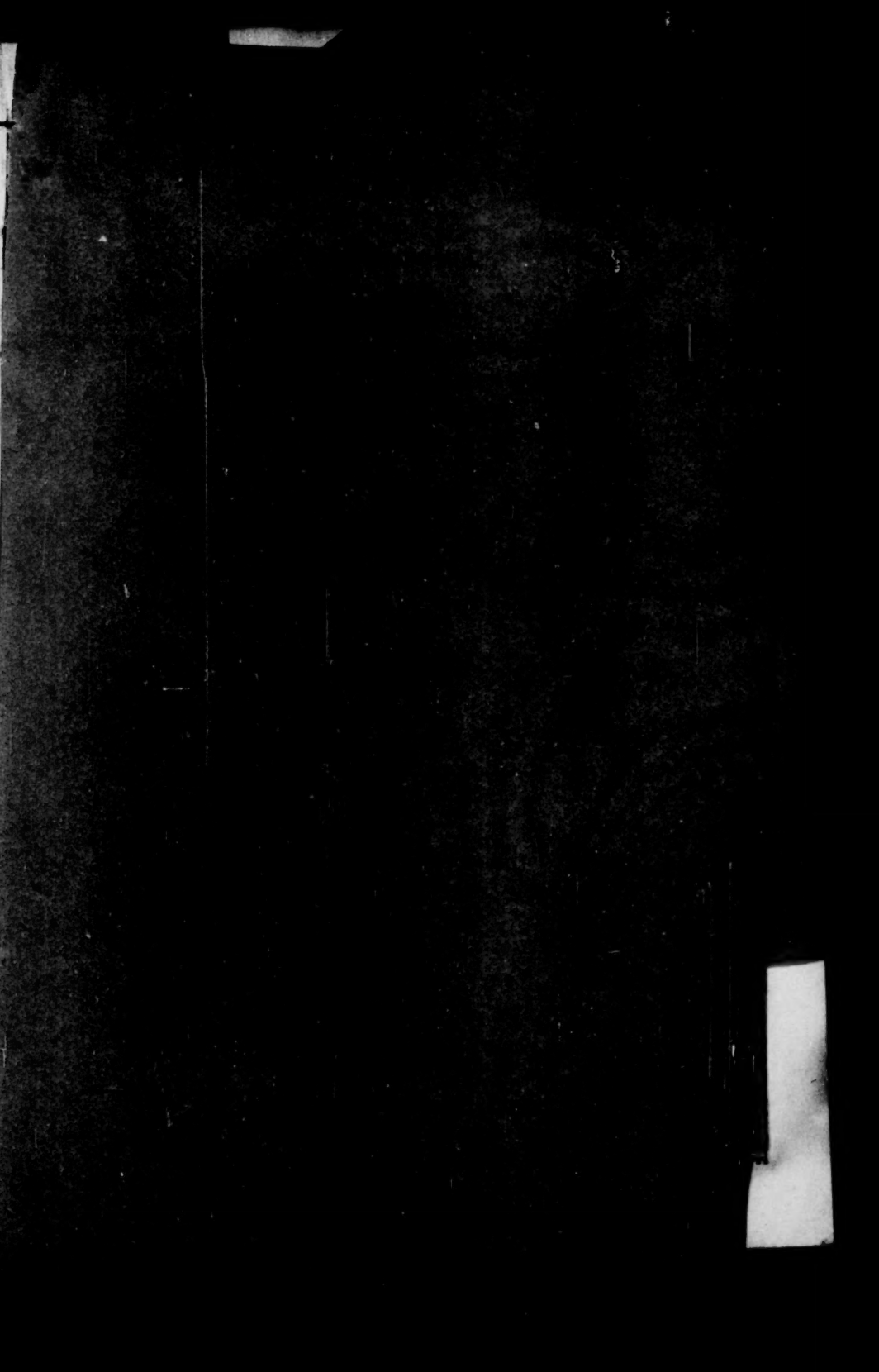
Lovett vs. Brown, 4 N. H., 511.

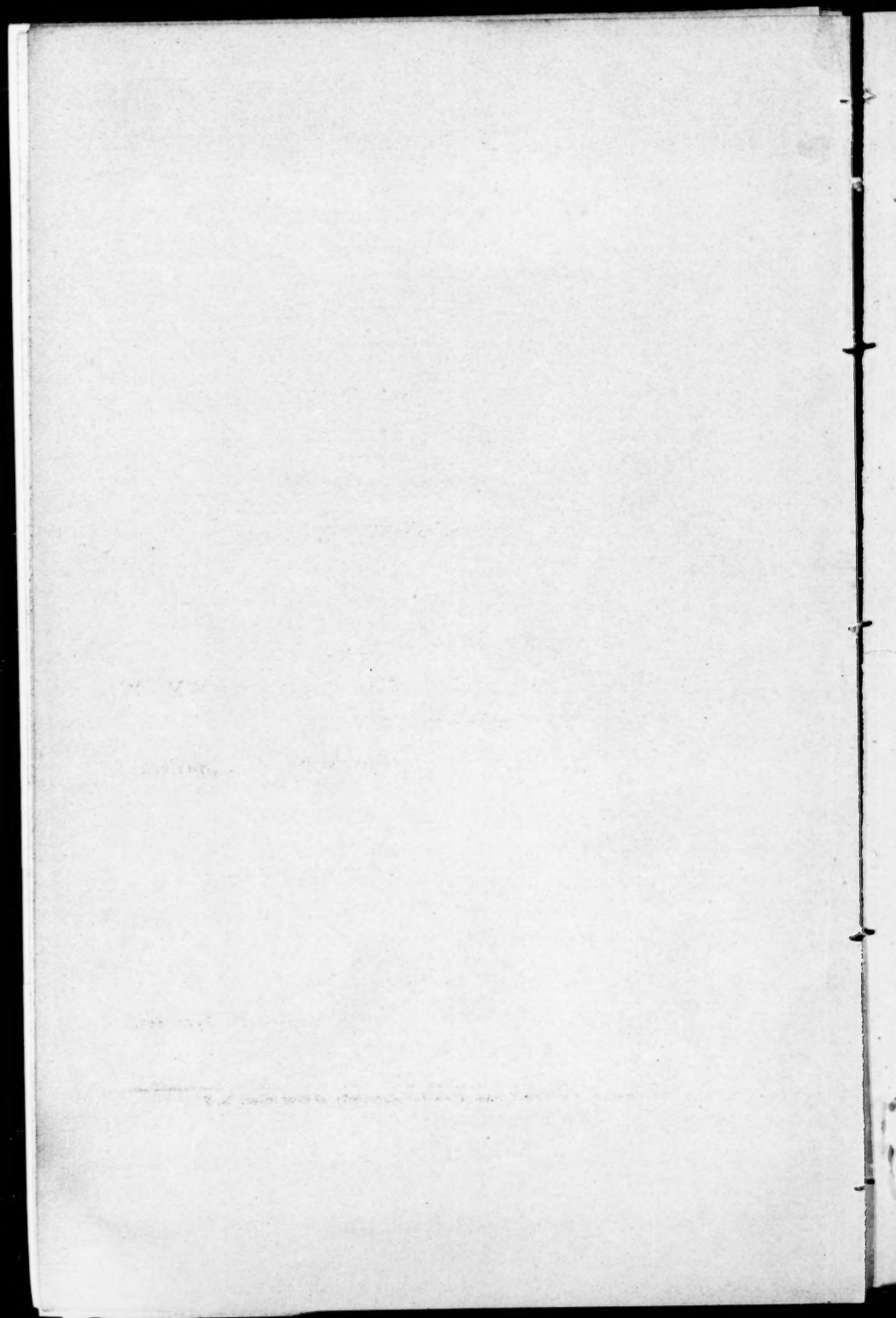
Steamboat White vs. Levy, 5 Eng. (Ark.), 411.

Lastly. The decree below should be affirmed.

HENRY J. SCUDDER,

Of Counsel for Appellees.





14-183 Filed
March 24, 1882
P.L.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 243.

WILLIAM G. WINSLOW AND HEZEKIAH J. WINSLOW, AP-
PELLANTS,

vs.

BLISS O. WILCOX, OWNER AND CLAIMANT OF THE
SCHOONER S. S. OSBORNE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF OHIO.

FILED SEPTEMBER 13, 1879.

No. 1211.

Bliss O. Wilcox, Owner & Claimant of
The Schooner "S. S. Osborne"

vs. Appellant

William G. Winslow and Hezekiah
J. Winslow.

Filed March 23, 1882.

SUPREME COURT OF THE UNITED STATES.

No. 243.

WILLIAM G. WINSLOW AND HEZEKIAH J. WINSLOW, AP-
PELLANTS,

vs.

BLISS O. WILCOX, OWNER AND CLAIMANT OF THE
SCHOONER S. S. OSBORNE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF OHIO.

INDEX.

PROCEEDINGS IN DISTRICT COURT.

	Original.	Print.
Warrant of arrest.....	2	1
Return.....	4	2
Bond of defendants.....	5	2
Alias warrant of arrest.....	7	3
Return.....	8	4
Bond of Winslow et al.....	9	4
Libel.....	11	5
Claim.....	16	7
Answer.....	17	8
Cross-libel.....	24	11
Schedule A.....	33	14
Answer to cross-libel.....	34	15

TESTIMONY.

Testimony of Charles O. Ingraham.....	37	16
Edward Ingraham.....	46	20
E. S. Outis.....	51	23
Albert Outis.....	56	25
George Magley.....	59	27
Frank Wicks.....	63	28
Thomas Gilkison.....	67	30
Alexander Stewart.....	71	32
Albert Landreth.....	78	35
John McCoy.....	82	37
Thomas Banner.....	88	40
John Debbage.....	91	41

	Original.	Print.
Testimony of William Bain	94	43
Morris Barrett	99	45
Christopher F. Moore	100	46
James P. Cotton	102	47
S. S. Rummage	109	50
E. M. Perkins	114	52
William P. Bryan	121	55
Robert F. Parsons	127	58
Peter Leib	136	62
James O'Neill	149	68
John Fell	159	73
William Smith	170	79
John McDonald	179	84
John Baker	184	86
Sylvester Smith	195	92
Peter Bondy	198	94
Capt. John French	205	97
William Seamans	217	103
William W. Seamans	223	106
William Carey	230	109
William Seamans	238	113
S. Lampoh	241	115
J. H. Andrews	247	118
Albert S. Outis	252	120
E. S. Outis	257	123
Edward Ingraham	260	124
C. O. Ingraham	263	125
William Price	271	129
Maggie Payne	276	132
Mrs. C. Loomis	282	135
Mrs. L. Wilcox	289	138
George Judson	299	143
George Stone	317	151
Cornelius Rewell	322	153
M. Thomson	331	158
C. B. Beach	334	159
C. J. Vogel	343	164
John Cowans	345	165
James Bowen	347	166
William M. Bates	349	166
John G. Keith	353	169
Exhibit (protest)	358	171
Robert Mott	363	173
George Magley	364	173
Thomas Gilkison	365	173
R. F. Parsons	365	174
C. Ingraham	367	175
Edward Ingraham		
E. Outis and Frank Wicks		
Exhibit (drawings)	369	175
The commissioner's report	370	175
Testimony before commissioner	372	166
Exhibit A	375	177
B		
C and D		
	376	178
	377	178

	Original.	Print.
Exceptions to commissioner's report.....	378	179
Final decree.....	379	179
Clerk's certificate.....	381	180
Appeal to the circuit court.....	382	180
Motion to dismiss appeal.....	384	181
Deposition of Mrs. Lydia Wilcox.....	385	182
H. L. Doran.....	392	185
Mrs. Maggie Paine.....	394	186
Arthur J. Justus.....	396	187
Robert Mott.....	397	187
Clifton B. Beach.....	407	192
H. L. Terrell.....	411	194
Appeal dismissed.....	415	196
Motion to vacate order of dismissal.....	416	196
Affidavit on motion to reinstate appeal.....	418	197
Order dismissing appeal set aside.....	419	198
Deposition of John G. Kieth.....	421	198
John Sutherland.....	425	200
Peter McCullough.....	430	202
Motion to dismiss appeal.....	435	205
Exception and motion of Bliss O. Wilcox.....	437	206
Notice to take testimony.....	440	207
Deposition of John E. Bailey.....	442	208
Cornelius Rewell.....	444	209
Mrs. Lydia Wilcox.....	447	210
Order.....	450	211
Bill of exceptions.....	451	212
Exhibit A to bill of exceptions (motion to dismiss).....	455	213
B to bill of exceptions (affidavit on motion to dismiss).....	457	214
C to bill of exceptions (affidavit of Vorce).....	459	215
D to bill of exceptions (affidavit of Condon).....	460	215
E to bill of exceptions (affidavit of Prentiss).....	462	216
F to bill of exceptions (affidavit of Terrell).....	465	217
H to bill of exceptions (motion to vacate order of dismissal).....	467	218
I to bill of exceptions (motion granted).....	469	219
J to bill of exceptions (appeal).....	470	219
Decree and reference.....	473	221
Order of continuance.....	474	221
Master commissioner's report.....	475	221
Exceptions to report of A. J. Ricks, special master.....	482	224

TESTIMONY BEFORE MASTER.

Deposition of Bliss O. Wilcox.....	484	225
J. W. Walton.....	491	229
William H. Radcliffe.....	493	230
John E. Cowle.....	498	232
Bliss O. Wilcox.....	498	232
Egbert De Ville.....	507	237
Cornelius Rewell.....	508	238
Lydia Wilcox.....	509	238
William Goodwin.....	512	240
Exhibits A and B to Mr. Wilcox's deposition.....	516	242
Exhibit C to Mr. Wilcox's deposition.....	517	242
Exhibits D, E, and F to Mr. Wilcox's deposition.....	518	243
Exhibits G and H to Mr. Wilcox's deposition.....	519	243
Exhibit J to Mr. Wilcox's deposition.....	520	244

Accounts
and re-
ceipts.

		Original.	Print.
Testi	Exhibits K and L to Mr. Wilcox's deposition.....	522	245
	Exhibit M to Mr. Wilcox's deposition.....	523	245
	Exhibits N and O to Mr. Wilcox's deposition.....	524	246
	Exhibit P to Mr. Wilcox's deposition.....	525	247
	Exhibits Q, R, and S to Mr. Wilcox's deposition.....	526	247
	T and U to Mr. Wilcox's deposition.....	527	248
	V and W to Mr. Wilcox's deposition.....	528	248
	X and Y to Mr. Wilcox's deposition.....	529	249
	Deposition of Cornelius Rewell.....	530	249
	J. H. Andrews.....	535	252
	George Stone.....	538	253
	Egbert De Ville.....	543	255
	D. L. Pennington.....	547	258
	B. O. Wilcox.....	553	260
	Lydia Wilcox.....	556	262
	John E. Post.....	557	262
	Charter.....	558	262
	Final decree.....	560	263
	Claimant's appeal bond.....	563	264
	Libellant's appeal bond.....	564	264
	Clerk's certificate.....	565	265
	Appeal of libellants.....	566	265

1 UNITED STATES OF AMERICA,
Northern District of Ohio, Eastern Division :

In the circuit court of the United States, within and for the northern district of Ohio, eastern division, in the sixth judicial circuit.

Proceedings had in said court at a regular term thereof, begun and held for its January term, A. D. 1879, at the United States court-house, in the city of Cleveland, in said district, before the honorable John Baxter, circuit judge for the sixth judicial circuit, on the 15th day of March, A. D. 1879, in the following case, to wit :

WILLIAM G. WINSLOW AND HEZEKIAH WINS-	} In admiralty.
low, owners of schooner American Union,	
<i>vs.</i>	
BLISS O. WILCOX, OWNER AND CLAIMANT OF	
schooner S. S. Osborne.	

2 On the 26th day of February, A. D. 1878, there was filed in the clerk's office of said circuit court a transcript from the district court in and for said district of Northern Ohio, which is in the following words and figures, to wit :

TRANSCRIPT FROM THE DISTRICT COURT OF THE UNITED STATES,
NORTHERN DISTRICT OF OHIO.

District court of the United States for the northern district of Ohio.

WILLIAM G. WINSLOW AND HEZEKIAH WINS-	} In admiralty.
low, owners of schooner American Union,	
<i>vs.</i>	
BLISS O. WILCOX, OWNER AND CLAIMANT OF	
schooner S. S. Osborne.	

Warrant of arrest.

NORTHERN DISTRICT OF OHIO, *ss* :

The President of the United States of America to the marshal of the northern district of Ohio, greeting :

3 Whereas a libel was filed in the district court of the United States for the northern district of Ohio, on the 6th day of September, in the year of our Lord one thousand eight hundred and seventy-two, by William G. Winslow and Hezekiah J. Winslow, against the schooner S. S. Osborne, her boats, tackle, apparel, and furniture, in a cause of collision, civil and maritime, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said vessel, her tackle, &c., may be cited in general and special to answer the premises, and due proceedings being had, that the said vessel, her tackle, &c., may, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant.

You are therefore hereby commanded to attach the said schooner S. S. Osborne, her tackle, &c., and to detain the same in your custody until the further order of the court respecting the same, and to give

due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold, pursuant to the prayer of the said libel, that they be and appear before the said court on the 1st day of the session to be held at the city of Cleveland, in and for the northern district of Ohio, on the first Monday in October next, at ten o'clock in the forenoon of the same day (if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction), then and there to interpose a claim for the same, and to make their allegations in that behalf.

4 And what you shall have done in the premises do you then and there make return thereof, together with this writ.

Witness the Hon. Charles T. Sherman, judge of the said court, at the city of Cleveland, this 6th day of September, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States of America the 97th.

[SEAL.]

EARL BILL, *Clerk*,

By CHAS. H. BILL, *Deputy*.

WILLEY, CAREY & TERRELL,
Proctors for Libellant.

Return.

NORTHERN DISTRICT OF OHIO, ss :

On the 6th day of September, A. D. 1872, I made due service of this writ, at the port of Cleveland, in said district, by attaching the within described property, and have the same now in custody, subject to the further order of the court.

I also left on board of said vessel a true copy of this writ, and appointed James Harden custodian.

Afterwards, to wit, on the 12th day of September, 1872, Bliss O. Wilcox, claimant, having given stipulation, with surety to the satisfaction of the court, to answer any decree in this cause, by direction of said court said property was released from said attachment and redelivered to claimant; whereupon I omitted to issue proclamation herein ordered.

5

N. B. PRENTICE,

U. S. Marshal,

By JOHN O'DELL, *Deputy*.

Bond.

Know all men by these presents, that we, Bliss O. Wilcox as principal, and J. Emery Bailey, and Thomas Courtwright as sureties are held and firmly bound unto William G. Winslow and Hezekiah J. Winslow in the sum of seventeen thousand dollars, lawful money of the United States, to be paid unto the said William G. Winslow and Hezekiah J. Winslow, their executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals, and dated this seventh day of September, in the year of our Lord one thousand and eight hundred and seventy-two.

Whereas a libel was filed in the district court of the United States for the northern district of Ohio, on the sixth day of September, 1872, by William G. Winslow and Hezekiah J. Winslow, against the schooner S. S. Osborne, her boats, tackle, apparel, and furniture, in a certain

action, &c., civil and maritime, for collision therein alleged to be due and owing to the said William G. Winslow and Hezekiah J. Winslow, amounting to eight thousand and five hundred dollars.

6 The condition of this obligation is such, that if the above bounden Bliss O. Wilcox, J. Emery Bailey, and Thomas Courtwright shall abide and answer the decree of this or any appellate court in such cause, then the above obligation to be void, otherwise to remain in full force and virtue.

B. O. WILCOX.

J. EMERY BAILEY.

THOMAS COURTWRIGHT.

[SEAL.]

[SEAL.]

[SEAL.]

Sealed and delivered in presence of—

J. R. OSBORNE,

S. M. SKIDMORE.

Taken and acknowledged before me by B. O. Wilcox this 7th day of September, 1872, at Cleveland, Ohio.

CHAS. H. BILL, [SEAL.]

U. S. Commissioner for the Northern District of Ohio.

UNITED STATES OF AMERICA,

Northern District of Ohio, ss :

Bliss O. Wilcox being sworn for himself, says, that he is worth seventeen thousand dollars over and above all of his just debts and liabilities. Sworn before me, this 7th day of September, 1872.

CHAS. H. BILL,

U. S. Commissioner for the Northern District of Ohio.

I hereby approve of the sureties in the within bond.

(Signed)

C. T. SHERMAN, *Judge.*

7 Taken and acknowledged by J. Emery Bailey and Thomas Courtwright before me this 11th day of September, A. D. 1872.

JOHN R. OSBORNE,

U. S. Commissioner for the Northern District of Ohio.

Alias warrant of arrest.

NORTHERN DISTRICT OF OHIO, ss :

The President of the United States of America to the marshal of the northern district of Ohio, greeting :

Whereas a cross-libel was filed in the district court of the United States, for the northern district of Ohio on the 11th day of December, in the year of our Lord one thousand eight hundred and seventy-three, by Bliss O. Wilcox against the schooner American Union, her boats, tackle, apparel and furniture, and William G. Winslow and Hezekiah J. Winslow in a cause of collision, civil and maritime, for the reasons and causes in the said cross-libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said property may be cited in general and special to answer the premises, and due proceedings being had, that the said property may for the causes in the said cross-libel mentioned, be condemned and sold to pay the demands of the cross-libellant.

You are therefore hereby commanded to arrest the said property and to detain the same in your custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having any thing to say why the same should not be condemned and sold pursuant to the prayer of the said cross-libel, that they be and appear before the said court on the first day of the session thereof, to be held in the city of Cleveland, in said district, on the first Monday in November next, at ten o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make allegations in that behalf.

And what you shall have done in the premises, do you then and there make return thereof, together with this writ.

Witness the Hon. Chas. T. Sherman, judge of the said court at the city of Cleveland, in said district, this 14th day of October, in the year of our Lord one thousand eight hundred and *thirteen*, and of the Independence of the United States of America the 98th.

[SEAL.]

EARL BILL, *Clerk.*

By CHAS. H. BILL, *Deputy Clerk.*

Return.

NORTHERN DISTRICT OF OHIO, ss :

On the 14th day of October, A. D. 1873, I arrested the within described property at Cleveland, Ohio, and have the same now in custody subject to the further order of the court.

I also delivered a true copy of this writ, duly certified, to B. H. Jones, captain of said schooner American Union, and appointed D. S. Wood keeper.

Afterwards, to wit, on the 15th day of October, A. D. 1873, claimants having given stipulation with surety to the satisfaction of the court to abide any decree of the court in said cause, by order of said court I released said property from arrest and redelivered it to claimants.

Thereupon I omitted to issue the proclamation herein ordered.

N. B. PRENTICE,

U. S. Marshal,

By S. M. SMEAD, *Deputy.*

Bond.

Know all men by these presents that we, Hezekiah J. Winslow and William G. Winslow, as principals, and Rufus K. Winslow and B. L. Pennington, as sureties, are held and firmly bound unto Bliss O. Wilcox in the sum of thirty-three thousand eight hundred and eighty-eight and $\frac{22}{100}$ dollars, lawful money of the United States of America, to be paid unto the said Bliss O. Wilcox, his executors, administrators or assigns, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated this 15th day of October, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas a cross-libel was filed in the district court of the United States for the northern district of Ohio, on the 11th day of October, A. D. 1873, by Bliss O. Wilcox against the schooner American Union, her boats, tackle, apparel and furniture, and William G. Winslow and Hezekiah J. Winslow, in a certain action, &c., civil

and maritime, for collision therein alleged to be due and owing to the said Bliss O. Wilcox, amounting to sixteen thousand nine hundred and forty-four dollars and thirty-six cents.

The condition of this bond is such that if the above-bounden Hezekiah J. Winslow and William G. Oviatt, Rufus K. Winslow and B. L. Pennington shall abide and answer the decree of this or any appellate court in such cause, then the above obligation to be void; otherwise to remain in full force and virtue.

RUFUS K. WINSLOW. [SEAL.]
B. L. PENNINGTON. [SEAL.]

Sealed and delivered in presence of—
S. M. SMEAD.

Taken and acknowledged before me this 15th day of October, 1873,
at Cleveland, Ohio.

CHAS. H. BILL, [SEAL.]
U. S. Commissioner for the N. D. O.

I hereby approve of the sureties in the within bond.

(Signed)

C. T. SHERMAN, Judge.

11

Libel.

In admiralty.

To the judge of the district court of the United States for the northern
district of Ohio:

The libel of William G. Winslow and Hezekiah J. Winslow, of the city of Buffalo, in the State of New York, against the schooner S. S. Osborn, whereof is or lately was master, her boats, tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein, in a cause of collision, civil and maritime, and thereupon the said libellants do allege and propound as follows:

First. That your libellants, at the time when the cause of action hereinafter stated arose, were the owners of the schooner American Union, which said schooner, as well as the aforesaid schooner S. S. Osborn, were vessels of twenty tons burthen and upwards, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between parts and places in different States and Territories upon the lakes and navigable waters connecting said lakes, within the true intent and meaning of the act of Congress.

Second. That on the 5th day of August, A. D. 1872, the said schooner American Union, being then, and also at the time of the collision hereinafter mentioned, tight, strong, staunch, and in every way well manned, tackled, appareled, and appointed, and having the usual and necessary complement of officers and men stationed at their proper posts and upon the lookout for the protection and safety of the
12 said vessel, set sail on a voyage from the port of Cleveland, in the State of Ohio, to the port of Escanaba, in the State of Michigan, sailing light without cargo; the said schooner American Union proceeded safely on her said voyage until Friday, August 9th, 1872, at 1 o'clock a. m., when she came to an anchor at Sand Bay, on the east side of Beaver Island, in Lake Michigan. At 9 o'clock p. m. of said last-named day the said schooner hoisted anchor and proceeded on her said voyage; at about 12 o'clock midnight, the said schooner sailing

close-hauled by the wind, with the wind about northwest by north, the course of the schooner being about due west, the green light of a vessel was made about two points of her lee or port bow. The said schooner American Union was kept steadily on her course, and about ten or fifteen minutes after said green light was made the vessel bearing it proved to be said schooner S. S. Osborn, ran into and collided with said schooner American Union, striking her on her port bow, about fifteen feet from her stern, crushing in her planks, frames, and ceiling, breaking her clamps and breast-hooks, tearing her flying-jib, springing her jib-boom, breaking her head-gear, and doing other damage to her. At the time of said collision, and for half an hour prior thereto, the night was bright and starlight. At the time of said collision, and for an hour prior thereto, the wind was about northwest by north. At the time of said collision, and for an hour prior thereto, the course of

13 of said collision and for an hour prior thereto, the said schooner American Union was sailing close-hauled full and by with star-board tacks aboard; that when the light of the colliding vessel was first made, and from that time up to the moment of the collision, the course of the colliding vessel was about northeast with the wind all the while free to her; that at the time of said collision, and for an hour prior thereto, the officers and men of the schooner American Union, were each and all at their respective proper places and posts, vigilant and attentive to their respective duties, and during all of said time the lights of the said schooner American Union were properly placed and screened and brightly burning, and in full view of a vessel approaching, as was the colliding vessel.

That said collision happened solely by reason of the following neglects and improper conduct of those in charge of the colliding vessel, which proved to be the schooner S. S. Osborn:

First. In not giving way and keeping clear of the schooner American Union, as they were in duty bound to do.

Second. In not having competent and skilful officers in command of said schooner S. S. Osborn.

Third. In not having a lookout properly placed and stationed to promptly make the lights of an approaching vessel.

Fourth. In not making or watching the lights of the schooner American Union, or understanding her approach and movements so as to avoid

14 her, as they were in duty bound to do, since the lights of said schooner American Union, were in full and unobstructed view of those in charge of said schooner S. S. Osborn for a long time prior to said collision, and by reason of said neglects said schooner American Union suffered damage from said collision to the amount of three thousand dollars, and is delayed in making necessary repairs by reason thereof for the space of twenty-two days, her charter value being two hundred and fifty dollars per day, her damage from said collision amounting in all to the sum of eighty-five hundred dollars.

For which your libellants claim they have a lien upon said vessel enforceable in this honorable court.

Third. That the aforesaid collision and damage was occasioned solely by the negligence, unskillfulness and carelessness of the persons navigating the said schooner S. S. Osborn, and not by or through any fault, negligence or improper conduct on the part of your libellants, said vessel, her master, or crew.

Fourth. That since the aforesaid collision, your libellants have applied in a friendly manner, to the owners of the said schooner S. S.

Osborn, and requested them to settle for the damages sustained by your libellants as above mentioned, but the said owners have refused to pay the same to these libellants, or any part thereof.

Fifth. That all and singular the premises are true, and that the said schooner S. S. Osborn, is now lying at the port of Cleveland, in the district aforesaid.

15 Wherefore your libellants pray that process in due form of law, according to the course and practice of this honorable court, in cases of admiralty and maritime jurisdiction, may issue against the said schooner S. S. Osborn, her boats, tackle, apparel and furniture; and that all persons having any interest therein, may be cited to appear and answer all and singular the matters aforesaid, and that this honorable court will be pleased to decree the payment of the damages aforesaid, with costs; and that the said vessel may be condemned and sold to pay the same, and that your libellants may have such other and further relief as in law and justice they are entitled to receive.

WM. G. WINSLOW.

HEZEKIAH J. WINSLOW.

WILLEY, CAREY AND TERRELL,

Libellants Proctors.

NORTHERN DISTRICT OF OHIO, ss:

Be it remembered, that on this 23rd day of August, A. D. 1872, before me at Cleveland, Ohio, personally appeared the within-named Wm. G. Winslow and made solemn oath that he had heard and read the foregoing libel, and knows the contents thereof, and that the same is true, as to his own knowledge, except as to those matters and things stated to be on his information and belief, and as to those matters and things he believes to be true.

[SEAL.]

CLIFTON B. BEACH,

Notary Public.

16

Claim.

In the district court of the United States in and for the northern district of Ohio.

WILLIAM G. WINSLOW AND HEZEKIAH J. }

Winslow

vs.

THE SCHOONER S. S. OSBORN. }

In admiralty. Claim.

Now comes William Seamens, master of the said schooner S. S. Osborn, and being duly sworn on his oath, says that Bliss O. Wilcox, of Painesville, in said district, is the sole owner of said schooner, and her appurtenances, and the said William Seamens in behalf of the said Bliss O. Wilcox, claims the said schooner S. S. Osborn, her tackle, apparel and furniture, against the said libellants and all persons lawfully intervening for their interest therein, for the purpose of enabling said Wilcox to enter into an undertaking, as required by law, to the marshal of said district to release said vessel from seizure.

WM. SEAMENS.

Subscribed in my presence, and sworn to before me, by the said William Seamens, this sixth day of September. A. D. 1872.

CHARLES H. BILL,

U. S. Commissioner.

In the district court of the United States in and for the northern district of Ohio, in admiralty.

To the honorable Charles T. Sherman, judge of said court:

The answer and claim of Bliss O. Wilcox, sole owner of the schooner S. S. Osborn, to the libel and complaint of William G. Winslow and Hezekiah J. Winslow against the said schooner, her tackle, &c., alleges as follows, to wit:

First. That the said respondent knows not whether the said libellant, at the time of the happening of the collision in said libel mentioned, were or were not the owners of said schooner American Union, and he therefore doth not admit or deny the same, but leaves the same to be proved. He admits that both said schooner American Union and said schooner S. S. Osborn were, at the time in said libel mentioned, vessels of twenty tons burthen and upwards, and were enrolled and licenced in said libel averred.

Second. The said respondent, from information, admits that said schooner American Union sailed from said port of Cleveland on or about the 5th day of August, A. D. 1872, on a voyage to the port of Escanaba, Michigan, sailing light, without cargo, and that she proceeded safely on said voyage until about one o'clock a. m. of said
18 ninth day of August, A. D. 1872, and that she then came to an anchor at said Sand Bay, and that at or about nine o'clock of same day she hoisted anchor and proceeded on her said voyage.

But he denies that said schooner American Union was, at the time she so sailed on said voyage, or at the time of said collision, tight, staunch, or strong, or that she was well manned, tackled, appareled, or appointed, or that she had the usual or necessary complement of officers or of men on board, or that they were all stationed at the proper posts, or were upon the lookout for the safety of said vessel.

And from information, the said respondent admits that about midnight of said ninth day of August, A. D. 1872, a green light of a vessel was made by those on board the said schooner American Union, but whether her course was then about due west, or whether said light was on her port bow, or what the precise bearing of said light from said schooner American Union was when it was so discovered, he is ignorant, and he therefore does not admit that the course of said schooner American Union was then about due west, or that said light, when discovered, was off her lee or port bow; and he denies that said schooner American Union was then sailing close hauled by the wind, or that she then had the wind from about northwest by north; on the contrary, he avers that the wind was then from about north by east, and that said schooner
19 American Union was then sailing with the wind free or abaft her beam.

Third. The respondent admits that said schooner S. S. Osborn was the vessel which carried said green light which was seen by those on board said schooner American Union, and that after said light was seen by those on board of said schooner American Union, she was kept steadily on her course, and that subsequently a collision occurred between said vessels, but whether or not said collision occurred within about ten or fifteen minutes after said green light was seen, he is ignorant, but he believes, and so alleges and charges, that said green light of said schooner S. S. Osborn was seen by those on board said schooner American Union for a much longer time than fifteen minutes before said

collision. He avers that he has no personal knowledge of the injury done to said schooner American Union by said collision, or of the amount of damage occasioned to her thereby, but from the best information he can obtain, he denies that by said collision the planks, frame, or ceiling of said schooner American Union were crushed in, or that her clamps or breast-hook were broken, or her flying-jib torn, or her jib-boom sprung, or her head-gear broken, or that she was otherwise damaged or injured.

On the contrary, he avers that the injury done to said schooner American Union by said collision was very slight and trifling, and was not such as to disable her or hinder her from continuing in her business of commerce and navigation, or to necessitate any delay on her part on account thereof.

Fourth. The said respondent denies that at the time of said collision, or for half an hour prior thereto, the night was bright or starlight, or that at the time of said collision, and for an hour prior thereto, the wind was about northwest by north, or that at the time of said collision, or for an hour prior thereto, the said schooner American Union was sailing close hauled, full, and by. On the contrary, he alleges that at the time of said collision, and for more than one hour prior thereto, the night was dark, thick, and cloudy, with no moon or stars visible, and that at the time of said collision, and for more than one hour prior thereto, the wind was north by east, or very near that point, and that at the time of said collision, and for more than one hour prior thereto, the said schooner American Union was sailing with the wind free, or abaft her beam, and said schooner S. S. Osborn was sailing close hauled by the wind.

And he denies that said schooner S. S. Osborn, at the time of said collision, or at any time during one hour prior thereto, had the wind free or abaft her beam.

And he further denies that at the time of said collision, or for one hour prior thereto, the officers or men of said schooner American Union were at their respective proper posts, or were vigilant or attentive to their respective duties.

And he denies that at the time of said collision, or at any time during one hour prior thereto, the lights of said schooner American Union were properly placed or screened, or were brightly burning, or that they were in full view of a vessel approaching, as was said schooner S. S. Osborn.

On the contrary, he avers that the lights of said schooner American Union, at the time of said collision, and for more than one hour prior thereto, were improper and insufficient and were not properly placed or screened, and were not so placed, fixed, or screened as to throw a uniform or an unbroken light from right ahead to two points abaft the beam, and were not so placed, fixed or screened as required by law; and were not in view of, and could not be seen by those on board a vessel approaching her as was said schooner S. S. Osborn.

Fifth. The said respondent denies that said collision happened through or by reason of any neglect, unskillfulness, carelessness, or improper conduct whatever on the part of any of those in charge of said schooner S. S. Osborn; or that the said schooner S. S. Osborn was in duty bound to give way to or keep clear of said schooner American Union, or that the lights of said schooner American Union were in full or unobstructed view of those on board of said schooner S. S. Osborn prior to said collision.

On the contrary, he avers that said collision happened without

22 any fault on the part of said schooner S. S. Osborn, and without any fault, and without any want of competence, want of care, or want of skill on the part of any of those engaged in her navigation.

And he alleges and charges that said collision was occasioned solely by and through the faults and negligence on the part of said schooner American Union, and those engaged in her navigation; and among other things he alleges that it was the duty of said schooner American Union to have kept out of the way of said schooner S. S. Osborn, as she could and should have done, but which she did not do.

That the signal-lights of said schooner American Union were improper and insufficient, and were improperly placed and fixed, and that said schooner American Union, and those engaged in her navigation were otherwise unskillful, negligent, and in fault.

Sixth. The said respondent denies that said schooner American Union suffered any damage whatever by reason of any neglect or improper conduct on the part of said schooner S. S. Osborn, her officers or crew, or that she suffered any damage from said collision to the amount of three thousand dollars, or that she was delayed in making necessary repairs by reason thereof for the space of twenty days, or that her charter value was two hundred and fifty dollars per day, or that
23 her damages from said collision amounted in all to the sum of eight thousand five hundred dollars, or that said libellants have any claim against or lien whatever on said schooner S. S. Osborn, therefore.

And the said respondent prays that full and strict proof be required of said libellants, of and concerning each and every allegation and statement in said libel contained not herein specifically and distinctly admitted; and that this honorable court will dismiss said libel and condemn said libellants in costs, and otherwise right and justice in the premises to administer, as to this honorable court may seem fit.

B. O. WILCOX.

PRENTISS & VARCE,
Proctors for Respondent.

District court of the United States for the northern district of Ohio.

Be it remembered that on this seventh day of December, A. D. 1872, before me, at Cleveland, in said district, personally appeared the within named Bliss O. Wilcox and made solemn oath that he had read the foregoing answer, and knows the contents thereof, and that the same is true to his own knowledge, except as to those matters and things stated to be on his information and belief, and as to those matters and things he believes it to be true.

B. O. WILCOX.

24 Sworn to before me, and subscribed in my presence by the said B. O. Wilcox, this seventh day of December, A. D. 1872.
[SEAL.]

GEORGE D. HENSDALE,
Notary Public.

Cross-libel.

In the district court of the United States within and for the northern district of Ohio. In admiralty.

To the honorable Charles T. Sherman, judge of said district court:

The libel and complaint of Bliss O. Wilcox, of Painesville, in said district, against the schooner American Union, her boats, tackle, apparel, and furniture, and against William G. Winslow and Hezekiah J. Winslow, her owners, and against all persons lawfully intervening for their interest therein, in a cause of collision, civil and maritime, doth allege and articulately propound as follows:

First. That said schooner is a vessel of more than twenty tons burthen, now lying at _____, and within the admiralty and maritime jurisdiction of this court; and at the time when the cause of action hereinafter mentioned accrued and arose, as is hereinafter stated, was enrolled and licenced for the coasting trade, and was employed
25 in the business of commerce and navigation between ports and places in different States and Territories of the United States, upon the lakes and navigable waters connecting the said lakes, within the true intent and meaning of the act of Congress.

Second. That on or about the ninth day of August, A. D. 1872, the schooner S. S. Osborn, whereof your libellant then was and yet is the sole owner, and which is a vessel of more than twenty tons burthen, and enrolled and licensed for the coasting trade, between ports and places in different States and Territories upon the lakes and navigable waters aforesaid, being then, and also at the time of the collision hereinafter mentioned, tight, staunch, strong, and in every respect well manned, tackled, appareled, and appointed, and having the usual and proper complement of men and officers on board and stationed at their proper posts, and upon the outlook for the safety and protection of said vessel, set sail upon a voyage from the port of Escanaba, in the State of Michigan, to the port of Erie, in the State of Pennsylvania, having on board a cargo of one thousand and fourteen tons of iron ore.

Third. That said schooner S. S. Osborn proceeded safely on said voyage until about midnight of said day, at or about which hour the wind then being, and having been for more than one hour prior thereto, from north by east, or from very near that point, and the night dark, thick, and cloudy, without moon or stars, said schooner S. S. Osborn then
26 being, and for a long time prior thereto having been, steering east by north half north, close hauled, with the wind on her port side, and then and for a long time prior thereto having and displaying good and sufficient signal-lights, properly placed, fixed, and screened according to law, and burning brightly, and good and sufficient watch and outlook kept to all points, the watch on board said schooner Osborn heard some one hail them from an approaching vessel which they were then unable to see; that after a very short interval of time said hail was followed by another from the same vessel, which the watch on board said schooner S. S. Osborn then discovered approaching, close aboard said schooner Osborn, a little on her lee bow, almost dead ahead, and so close to said schooner Osborn that there was not time for said schooner Osborn to do anything to avoid it before a collision occurred between said vessels, said vessel from which said hail was heard, and which proved to be the schooner American Union, striking said schooner Osborn on her port bow, and carrying away her

bow-sprit, jib-boom, foremast, and windlass, and crushing in her port bow, and otherwise damaging her hull forward, and wholly disabling her from proceeding further on her said voyage.

Fourth. That at the time of said collision, and for more than one hour prior thereto, said schooner S. S. Osborn was sailing close hauled by the wind, heading east by north half north, or very nearly on that course, and had her proper lights in good and proper condition, well trimmed and burning brightly, and so placed and fixed as to
27 throw an unbroken light from right ahead to two points abaft her beam, and properly screened according to law, and clearly visible at a distance of two miles to a vessel approaching as was said schooner American Union; that said schooner S. S. Osborn, at the time of said collision and for a long time prior thereto, had her full and proper complement of officers and men, who were each and all at their respective proper posts and places, and vigilant and attentive to their respective duties; that at the time of said collision and for more than one hour prior thereto the night was dark, thick and cloudy, with no moon or stars, and the wind during all of said time was steady from north by east, or very near that point.

Fifth. That at the time when said collision occurred, and for a long time prior thereto, the signal lights carried by the said schooner American Union were improper and insufficient, and were improperly placed and fixed, and fixed on her main rail, close to her mizzen rigging, and were not so placed or fixed as to throw the light thereof from right ahead to two points abaft the beam, and were not so placed or fixed as required by law, and were not so placed or fixed as they should have been in order that one or both of them could have been seen by the watch and outlook of the said schooner S. S. Osborn while the two vessels approached each other as they did; that the libellant is ignorant of the precise course on which said schooner American
28 Union was proceeding before said collision occurred, and of her precise bearing from said schooner S. S. Osborn at and before said first hail was heard, but from information the said libellant alleges and charges that the said schooner American Union was so proceeding with the wind free or abaft her beam and sailing light, and was so proceeding that it was the duty of the said schooner American Union and those on board of her engaged in her navigation, to keep out of the way of said schooner S. S. Osborn, as they could and should have done.

Sixth. The said libellant alleges and charges that the starboard light of said schooner S. S. Osborn was plainly seen by those on board of said schooner American Union for a long time prior to said collision, and in ample time to enable said schooner American Union to have kept out of the way of said schooner S. S. Osborn, and avoided a collision with her, which those in charge of said schooner American Union were in duty bound to do; that by reason of the insufficient and improper quality and condition of said lights so carried by said schooner American Union, and by reason of the improper and unsuitable position of the same, said lights were not visible to those on board of said schooner S. S. Osborn, notwithstanding a good and proper lookout was kept therefor by those on board said schooner S. S. Osborn and
29 said lights were not seen, and by reason of their condition and position could not be seen by those on board of said schooner S. S. Osborn until it was too late for those on board said schooner S. S. Osborn to avert a collision, although they did everything which it was possible to do to avert a collision after they so discovered said schooner American Union approaching them as aforesaid.

That it was the duty of said schooner American Union, having the wind free, to have kept out of the way of and avoided said schooner S. S. Osborn, which was closely hauled by the wind, which the said schooner American Union had ample time to do after the said light of said schooner S. S. Osborn was seen by those on board of said schooner American Union, as aforesaid. Yet the said schooner American Union did not, nor did any of those on board of her, keep out of the way of said schooner S. S. Osborn, or avoid, or in any manner attempt to avoid, said collision, but did continue on her course with full knowledge of the approach of said schooner S. S. Osborn, and did, recklessly, carelessly, negligently, and unskillfully run into and collide with said schooner S. S. Osborn.

Seventh. That said collision was not caused by or through any fault or negligence on the part of said schooner S. S. Osborn, her officers or crew, but occurred without any fault on the part of said schooner S. S. Osborn, and without any fault and without any want of competence, want of care, or want of skill on the part of any of those engaged in

her navigation; and the said libellant alleges and charges that
30 that the same was caused wholly by and through the fault, negligence, incompetence, and unskillfulness of the officers and crew of said schooner American Union, among other things, in not causing suitable or proper signal lights in proper positions on board of said schooner American Union, and in not keeping out of the way of and voiding said schooner S. S. Osborn, as they could and should have done, when her approach was perceived by those on board of said schooner American Union, and in not using every reasonable and practicable effort to avoid said collision, as said schooner American Union and those engaged in her navigation were in duty bound to do, and in otherwise failing and neglecting to avoid said collision.

Eighth. That through and by reason of said gross carelessness, incompetence, and neglect of duty on the part of those on board of said schooner American Union, and engaged in her navigation, and by reason of said collision said schooner S. S. Osborn suffered damage to the amount of six thousand and forty-four and $\frac{3}{10}$ dollars, and was obliged to be towed from near the place where said collision occurred to the port of Cleveland, in said district, for repairs, the expense and cost of which said towing service was nine hundred dollars, and has been delayed in and about the repairing of said damage for the space of forty-seven days, and has, by reason of said collision, been subjected to other expenses.

31 That the charter value of said schooner S. S. Osborn during said period was and is two hundred and fifty dollars per day, and that her total damage by reason of said collision is sixteen thousand nine hundred and forty-four and $\frac{3}{10}$ dollars, for which the libellant claims a lien upon said schooner American Union, her boats, tackle, apparel, and furniture, and which said sum the said libellant's damage, so by him sustained, the said schooner American Union, her master, and owners, although often requested to pay, aver, have, and still do utterly refuse to pay.

A schedule of the libellant's said damages is hereto attached, marked A.

Ninth. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore, your libellant prays that process in due form of law, according to the course and practice of said honorable court in cases of admiralty and maritime jurisdiction, may issue against the said schooner

American Union, her boats, tackle, apparel, and furniture, wheresoever the same shall be found, and that all persons having, or pretending to have any right, title, or interest therein, may be cited to appear, and to answer, all and singular, the matters hereinbefore set forth; and that this honorable court will be please' to pronounce for the damages aforesaid, and to decree the payment thereof to your libellant, with costs; and for such other relief in the premises as shall to law and justice appertain, and also to condemn the said schooner American Union, her boats, tackle, apparel, and furniture, that the same be sold to pay said damages and costs.

B. O. WILCOX.

PRENTISS & VORCE,
Proctors for Libellant.

District court of the United States for the northern district of Ohio, ss :

Be it remembered, that on this seventh day of December, A. D. 1872, before me, at Cleveland, in said district, personally appeared the within-named Bliss O. Wilcox, and made solemn oath that he had heard read the foregoing libel, and knows the contents thereof, and that the same is true to his own knowledge, except as to those matters and things stated to be on his information and belief, and as to those matters and things he believes it to be true.

B. O. WILCOX.

Sworn to before me, and subscribed in my presence, by the said B. O. Wilcox, this 7th day of December, A. D. 1872.

[SEAL.]

GEORGE D. HINSDALE,
Notary Public.

33 *Schedule A, referred to in the foregoing libel, and forming part thereof.*

William H. Radcliff, repairs.....	3,228 65
John O'Neil ".....	264 94
Upson and Walton ".....	201 73
A. Larcom ".....	166 14
S. B. Conklin ".....	121 44
Northern Transportation Company, towing.....	150 00
Prop. City of Detroit ".....	500 00
Tug Kate Williams ".....	250 00
Hebard, Hawley & Co., repairs.....	37 40
William H. Radcliff ".....	225 00
Quayle and Martin (spar and bowsprit).....	290 00
William Smith, repairs.....	410 00
A. T. Van Tassel & Co. ".....	7 45
Globe Iron Works ".....	91 61
Time of B. O. Wilcox, capt. & crew in making ".....	1,000 00
Demurrage, 40 days, @ \$250.00.....	10,000 00
Total amount.....	16,944 36

Answer to cross-libel.

U. S. district court, northern district of Ohio. In admiralty.

BLISS O. WILCOX
vs.
 SCH'R AMERICAN UNION. } Answer.

34 The answer of Hezekiah J. Winslow and William G. Winslow, of Buffalo, New York, to the libel Bliss O. Wilcox alleges and articulately propounds as follows, to wit :

1. That they are the sole, true, and bona fide owners of the schooner American Union.

2. They deny that the schooner Osborn, at the time alleged, had her officers and men properly placed and *and* stationed, or that she had proper officers and men.

They allege she had no competent mate, and that at the time of the collision and for some time prior thereto her lookout was aft and not at his post.

3. They deny that at the time of the collision, or at any time prior thereto, the wind was from north by east, or near that point, or that the night was dark, thick, or cloudy, or that Osborn was steering east by north half north close hauled; they deny that those on board Osborn heard any hail or that the American Union came from dead ahead, or nearly so, or struck the Osborn on her port bow.

4. They deny that at the time of said collision, or for an hour prior thereto, the Osborn was close hauled, or heading at the time of the collision east by north half north, or had her officers or men properly placed or stationed, or vigilant or attentive to their duties.

5. They deny that the lights of the American Union were improper or insufficient, or were improperly placed or fixed, or that they were not visible as required by law, or that they could not be seen by
 35 lookout of Osborn; they deny that the American Union had the wind free or abaft the beam, or that it was her duty to keep out of the way.

6. They deny that said collision was not caused by any fault or negligence on the part of the Osborn, or that the same was caused by any fault, negligence, incompetence, or unskillfulness on the part of the American Union.

7. They allege the Union had proper lights, properly placed, and brightly burning at time of and for several hours prior to collision; that the Union was heading west, close hauled, on her starboard tack, with the wind about NW. by N., and allege as in their libel they have already alleged.

Wherefore they pray as they have already in their libel prayed.

WILLEY, TERRELL & SHERMAN,
Proctors for Defendant.

NORTHERN DISTRICT OF OHIO, ss :

William G. Winslow, being duly sworn, says that the facts set forth in the foregoing answer are true, as he believes.

WM. G. WINSLOW.

Sworn to and subscribed before me this st day of May, 1877.

EARL BILL,
U. S. Commissioner.

36 Within and for the county of Cuyahoga, in said State, by the governor thereof, and under and by virtue of an act of Congress of said United States authorizing notary publics to take and certify oaths, affirmations, and acknowledgements in certain causes, approved Sept. 16th, 1850, and the act supplementary thereto, approved July 28th, 1854.

UNITED STATES OF AMERICA,

Northern District of Ohio, City of Cleveland,

County of Cuyahoga, and State of Ohio :

Be it remembered that on the 26th day of August, A. D. 1872, I, Clifton B. Beach, a notary public duly appointed, did call and cause to be and personally appear before me at my office, at No. 81 Public Square, in the city of Cleveland, in said northern district of Ohio, in the State aforesaid, Charles O. Ingraham, Edward Ingraham, E. S. Outis, Albert Outis, George Magley, Frank Wicks, Thomas G. Gilkinson, Alexander Stewart, and Albert Landreth to testify, and the truth to say, on the part and behalf of the libellants, in a certain suit or matter of controversy now pending and undetermined in the district of Ohio, wherein and Wm. G. Winslow are libellants, and the schooner S. S. Osborn is defendant.

And the said Charles O. Ingraham, being about the age of 30 years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, did therefore depose, testify, and say, as follows :

U. S. district court northern district of Ohio. In admiralty.

WILLIAM G. WINSLOW ET AL. }

vs.

SCHOONER S. S. OSBORN. }

Depositions taken by consent.

H. L. Terrell appearing on behalf of libellants.

Loren Prentiss, on behalf of defendants.

CHARLES O. INGRAHAM being first duly examined, cautioned, and sworn to speak the whole truth, and nothing but the truth, deposes and says :

Q. 1. State your name, age, residence, and occupation.

A. Charles O. Ingraham ; South Haven, Michigan, is my residence ; occupation, sailor ; age, 30.

Q. 2. How long have you sailed and in what capacity ?

A. Have sailed about 20 years. Have been everything except owner ; before the mast, mate, second mate, and master. I sailed as second mate 2 seasons, as mate 10 years. Have been master about 2 years.

Q. 3. On what vessel have you been sailing during the past season ?

A. On the American Union.

Q. 4. State whether you were on the American Union on her last trip, when she collided with the S. S. Osborn.

A. I was.

Q. 5. State on what voyage your vessel then was, and the particulars of the collision.

38 A. We were bound up from Cleveland to Escanaba ; we were light. Don't remember the day we left here. We came to under

Beaver Island, Lake Michigan; wind about southwest; this was about one o'clock in morning; we laid there till about nine or half-past nine the following evening; we got under way about half-past eleven o'clock that night; we shook her up, let her sheets out; we were steering the vessel by the wind at that time; about ten minutes past 12 I made a green light on our port bow; I spoke to the captain, he came on deck; I showed him the light about two (2) points on our lee or port bow; in about five minutes after that we collided; she struck us about fifteen feet from our stern on our port bow; the vessel came alongside and we lashed them together; she struck us coming head on; she broke some of our frame and plank, cat-head, jib-boom, guyes, flying-gibs, broke us up generally.

Q. 6. You say at half-past eleven o'clock you shook her up, what do you mean by that?

A. I mean to get her sheets aft so she would lay closer to the wind.

Q. 7. State in what direction the wind was at eleven and half, and what changes, if any there was, in the wind from that time on until the time of the collision?

A. The wind was northwest by north; it did not change any that I could see up to the time of the collision.

Q. 8. State how you were steering from half past eleven up to the time of the collision.

39 A. We were steering about west, as close as she would go by the wind.

Q. 9. What tacks aboard?

A. Starboard tacks aboard.

Q. 10. State what kind of a night it was.

A. Well, it was a treacherous looking night, wasn't a dark night, some stars out.

Q. 11. You may state the conditions of your lights at the time of the collision, and an hour previous.

A. Our lights were forward of the mizzen rigging, setting on the rail outside of the monkey rail, in a screen. They were burning good.

Q. 12. You may state at what rate of speed the vessel was running at the time of the collision, and shortly previous thereto.

A. About 8 knots an hour.

Q. 13. About what direction was the Osborn going when she struck you?

A. I should think she was heading about northeast, as near as I could tell.

Q. 14. Who were on deck at the time of the collision your vessel?

A. I was on deck, the captain and second mate, also George Magley, Thomas Mott. I don't remember the other names.

Q. 15. Whose watch was it?

A. It was the second mate's watch at time of collision.

Q. 16. Who was at the wheel?

A. George Magley.

Q. 17. Who was at the lookout?

A. Thomas Mott.

Q. 18. State how you came to be on deck after twelve o'clock.

40 A. Captain said he was not feeling very well and wanted to know if I would not stay on deck an hour. I told him I would do so.

Q. 19. What position did you occupy on board the American Union at that time?

A. I was 1st mate.

Cross-examination:

Q. 20. How long had you been on deck prior to the collision?

A. Had been on deck all night.

Q. 21. How long had the men that you say were on deck at the time of the collision been on deck?

A. About ten or fifteen minutes.

Q. 22. State the position of each one on deck at and immediately before the collision.

A. There was one (Magley) at the wheel; one (Mott) on the top gallant forecandle; the other one (don't remember his name) was forward.

Q. 23. Give the names of those who had been on deck in the watch prior to those men coming on deck.

A. One of them was E. S. Outis, one Frank Wicks, and A. Outis, C. O. Ingraham, and Captain Parsons. The captain went below a little before twelve. Had been on deck about five minutes, I think, before the vessel struck us. He had been below about ten (10) minutes.

Q. 24. On what part of the vessel were you standing immediately prior to, and at the time of the collision?

A. First I made the vessel's light. I was on our vessel's port quarter, then I went right forward, I got up on the forecandle deck, I
41 started then immediately aft. I stood right at the knee timber heads aft. I thought he was closer than I wanted to see him, and turned and spoke to the captain in his room. He immediately came out. I showed him the green light on our port bow, he told me to go forward and hollar to them to keep off. I went forward and hollered to them. I see that he was coming into us and I started and ran aft.

Q. 25. What orders if any were given by you or the captain after you saw the lights of the Osborn?

A. All the orders that were given was to keep her steady on the wind, Captain Parsons gave these orders. These were all the orders I heard. I gave none myself.

Q. 26. Who first saw the light of the Osborn, and on what part of the vessel was you standing at that time?

A. I first saw the light. I was standing on the port quarter when I saw it.

Q. 27. How long was that before the collision?

A. I did not pay much attention as to time; eight or ten minutes I should say. The lookout halloed about the same time I saw the light.

Q. 28. Do you know exactly the course of your vessel at the time of the collision?

A. Her course was full and by the wind, heading due west.

Q. 29. What means have you of knowing that?

A. The way I know it is, the vessel works in about ten points and the wind was northwest by north. I looked at the compass at 12
42 o'clock; I noticed the vessel being on the wind all the time from that time on till I called the captain.

Q. 30. What difference if any would there have been in the position of your sail if the wind had been northeast, and you had been sailing before instead of by the wind?

A. If we had been before the wind our sheets would have been off; we were by the wind and our sheets were hauled flat aft.

Q. 31. What was the actual position of your sails immediately prior to the collision?

A. They were hauled aft by the wind.

Q. 32. How much of a breeze was there that night?

A. Well, sir, I should say our vessel was going about eight knots an hour; we would call it a good breeze.

Q. 33. How long had the wind been in the position it was at the time of the collision?

A. From the time we commenced getting underway until I got the vessel straightened up, about half past eleven, I had been busy with the men and had not noticed the wind much. The captain had charge.

Q. 34. Had you any lights on deck aside from the two you have spoken of and how near were those to the stern of your vessel?

A. No, sir, we had not; I don't know the exact distance, they were forward of and close to the mizzen rigging.

Q. 35. Were those colored lights?

A. Yes, sir. Red and green.

Q. 36. State on which side they were carried respectively.

43 A. The red on the port and green on starboard.

Q. 37. Had the direction of the wind changed any after half past eleven?

A. No, sir.

Q. 38. Had it changed any during that evening?

A. I hadn't paid much attention to the wind till we shook her up. The captain was tending to that.

Q. 39. Where was the vessel at the time you shook her up as you say?

A. She was south and east of the Beaver Island light, we had not got up to the lights yet.

Q. 40. Did you see any light on the Osborn beside the green light?

A. No, sir; we did not.

Q. 41. After the collision did the vessels remain entangled together, and drift before the wind?

A. The vessels came alongside one another, we put a line out and lashed them together. They drifted nearly before the wind, nearly so. No, I don't know as they did, up the lake, if anything, after we got our vessel clear, about seven o'clock in the morning, we dropped the Osborn astern, and got sail on our vessel, and started to tow the Osborn. We were then nearly off the end of Fox Island, within seven or eight miles of the island, a little east.

Q. 42. How far was you from where the collision occurred as near as you can judge?

A. About fifteen miles, I guess.

Q. 43. In what direction from the place of the collision?

A. Can't answer that, don't know what direction.

Q. 44. How far had you proceeded beyond the end of Beaver Island at the time of the collision?

44 A. I should think we were three or four miles past the light.

Q. 45. What changes were made, if any, in the position of the sails of either vessel after the collision?

A. We did not make any change in our vessel, we got one of them in and put it up again; I believe they hauled their sails aft to take them in.

Redirect.

Q. 46. How far could the canvas of the vessel be seen that night at about the time of the collision?

A. I should say about two (2) miles.

Q. 47. Did you hear any conversation after the collision between the captains of the vessel, or have you heard the captain of the Osborn

make any statements in regard to the collision; if so, you may state what he said.

A. I heard Captain Parson speak to Captain Seamons and ask him if our lights were not nice lights, and he said they were splendid lights, I heard Capt. Seamons say it was too bad about the collision, because he had his boy with him as mate. He said he had a good mate two trips ago, but he could not find any one he could trust, so he took his boy; Captain Parsons told him to take his sails in; he wanted to know how to do that; Capt. told him to cut the halyards and let them come down. I heard Capt. Seamons say he was steering for Beaver Island light.

Further cross-examination.

Q. 48. When did you first become mate, or second mate?

A. I don't remember now exactly what year it was in, about 45 fifteen years ago, I think.

Q. 49. In what capacity have you sailed since then?

A. I have been mate, 2nd mate, and master. I have held one or the other of the positions since then. Have not sailed before the mast. Have sailed most of every season.

Q. 50. Did you see a vessel or propeller at the docks at Fox Island the morning after the collision, and did you see the light on Fox Island after the collision?

A. I saw the propeller in the morning at Fox Island. I don't remember now of seeing the light. I saw the island as soon as it was daylight.

Q. 51. How near did the vessels go as they drifted to the dock where the propeller lay, and how far did they drift after they passed the dock?

A. I think we were off seven or eight miles, as near as I can tell from the island, and I should not think we drifted much past the dock. I did not pay much attention to it.

C. O. INGRAHAM.

United States district court, northern district of Ohio. In admiralty.

WILLIAM G. WINSLOW ET AL.,

vs.

SCHOONER S. S. OSBORN.

} Depositions taken by consent.

H. L. Terrell appearing for libellants.

Loren Prentiss " " defendant.

46 Also EDWARD INGRAHAM being duly examined, cautioned, and sworn to speak the truth, the whole truth, and nothing but the truth, deposes and says:

Q. 1. State your name, age, occupation, and place of residence?

A. My name is Edward Ingraham; 24 years old; sailor by occupation; reside in Painesville, Ohio.

Q. 2. How long and in what capacity have you served as sailor?

A. Have been sailing about eleven or twelve years. Been before the mast and second mate.

Q. 3. What vessel did you last sail on?

A. The American Union.

Q. 4. State whether you were on her at the time of the collision with the Osborn?

A. Yes, sir.

Q. 5. In what capacity?

A. Second mate at the time of the collision.

Q. 6. State on what voyage she was bound at the time of the collision, and the circumstances of the collision as far as you know?

A. She was bound to Escanaba. We anchored at Sand Bay between 12 and 1 the night before the collision, I don't remember what time we got under way, 'twas in the evening some time. I came on deck about 12 o'clock. At the time I came on deck at 12 o'clock I can't state where the vessel was. I did not look at Beaver Island light. The vessel was at that time sailing by the wind, her sheets flat aft; we had star-board tacks aboard; when I came on deck the captain and mate were both on deck, I had nothing to do with the canvas. From that time on till the collision she was sailing by the wind, her sheets flat aft. I don't know how the vessel was heading, I did not look at the compass. When they are both on deck I don't go aft much. I think she was heading about west. Her lights were placed a little forward of the mizzen rigging, both of them burning. I heard no conversation between the two captains after the collision. I saw the Osborn before she struck us. Saw her green light. The mate called my attention to the green light. Then he turned around and called up the captain.

Q. 7. State who, if any person called your attention to the light of the Osborn, and what was said in relation thereto.

(Objected to by defendants as far as relates to conversation.)

A. The mate called my attention. He said to me, "Watch that light and soon you will see a red light." He turned round then and called the captain. When I first saw the light she was coming right into us, right for our fore rigging. She was almost ahead a little on the port side.

Cross-examination:

Q. 8. How long have you been second mate?

A. I was about three months last fall, and about two months this season.

Q. 9. What time did you go below the night of the collision, and what time did you come up?

48 A. I went below, I might have been nine or half past. I remained below till twelve.

Q. 10. What called you on deck at twelve?

A. It was eight bells, sir, and my watch on deck at 12 o'clock.

Q. 11. How long had you been on deck before the mate called your attention to the green light of the Osborn?

A. It might have been five minutes, or little more, ten minutes probably.

Q. 12. How soon after your attention was called to the light did the mate call the captain up?

A. Well, just as soon as he could step to the door, 'twasn't a minute probably.

Q. 13. Did you pay any particular attention to the sails when you came on deck?

A. No, sir; I only noticed they were flat aft by the wind. The captain and mate were both on deck then.

Q. 14. Where did you and the mate stand at the time he called your attention to the green light?

A. On the port side forward of the cabin, probably four or six feet from the cabin.

Q. 15. Did the mate go forward toward the lookout after calling your attention to the light before he called the captain?

A. No, sir; he turned right around and called the captain.

Q. 16. How long after the captain came on deck before the collision occurred?

A. Well, sir, only a very few minutes. The captain took a look at the light and told the mate to run forward and tell them to keep away.

49 Q. 17. Were any orders given to the man at the wheel after you came on deck?

A. Not as I know of, I was not at the wheel.

Q. 18. Were the vessels fastened together alongside stern and aft, immediately after the collision?

A. Yes, sir; they were fastened.

Q. 19. Did they drift before the wind in that condition during the night, till seven or eight o'clock next morning?

A. Yes, sir; they drifted and were going ahead at the same time.

Q. 20. Did you remain on deck during the rest of the night, and if so, what were your duties, and what did you do?

A. Yes, sir; I was on deck the rest of the night working around about decks.

Q. 21. Who had charge of the vessel during the night, on the part of the officers, after the collision?

A. The captain.

Q. 22. What orders, if any, was given to the man at the wheel during the night after the collision, if any man was kept at the wheel?

A. I don't know what orders, and don't know whether any one was kept at the wheel.

Q. 23. What sails were taken in, and what sails were left standing, during the night after the collision?

A. They were all kept standing except the mizzen.

Q. 24. What was the bearing of the wind on your vessel during the night after the collision?

A. I forget what the wind was.

Q. 25. You say you made headway during the night, with respect to what vessel do you say this, and in what direction did you make headway?

50 A. The American Union made headway. I can't say in what direction, did not look at the compass.

Q. 26. Did you see a propeller lying at the southerly end of South Fox Island, and how far were you from it in the morning?

A. I saw a propeller lying there at the dock, I can't say as to the distance, I did not notice the spars of the propeller.

Q. 27. Did the vessels remain fastened together as above stated, till after you passed by the propeller?

A. They lay together, sir, till along about seven o'clock in the morning. I can't tell whether she was alongside or not, I think we had her in tow when we saw the propeller.

Q. 28. Did the vessels pass by the propeller?

A. No, sir.

Q. 29. What was the bearing of the propeller to the vessels at the time the vessels were unfastened from alongside, and you took the Osborn in tow?

A. I don't know what the bearing was, I did not look at the compass.

EDWARD INGRAHAM.

United States district court, northern district of Ohio. In admiralty.

WILLIAM G. WINSLOW ET AL.	} Depositions taken by consent.
<i>vs.</i> SCHOONER S. S. OSBORN.	

51 H. L. Terrell appearing for libellants.
Loren Prentiss appearing for defendants.

E. S. OUTIS being duly examined, cautioned and sworn to speak the truth, the whole truth and nothing but the truth, deposes and says:

Q. 1. State your name, age, occupation, and place of residence.

A. E. S. Outis is my name; age, 54; occupation, farmer and sailor; live in Mentor.

Q. 2. How long have you sailed, and in what capacity?

A. Have sailed before the mast for seven years, 25 years ago I sailed on these lakes, I have sailed more or less for eleven years.

Q. 3. State on what vessel you have been sailing this season during the month of August, 1872.

A. American Union, I was aboard of her at the time of the collision with the Osborn.

Q. 4. State what voyage the American Union was then on, and all you know about the collision?

A. She was bound to Escanaba, I had the fore part of the evening watch, between the hours of 8 and 12, I then went below by order of the mate relieved from the lookout. I was on the lookout mostly four hours, we came at anchor one o'clock in the day, remained there till about half-past nine. When got under way we rounded the south point of Beaver Island between the hours of 10 and 11. I don't know the course, I was not at the wheel. We were abreast of the Beaver Island light about ten o'clock. Thomas Gilkison took the wheel at about that hour. After we had rounded the point the mate called us aft to brace her up,

52 that is to bring her closer in the wind; from that time when I was called to the mizzen sheet, I took a look at the fly and compass, and she was then heading not far from west, that would make the wind not far from northwest by north. Her sails were trimmed from that time on to the collision, close hauled and sharp up. We had starboard tacks aboard, the sails remained in that position from that time until I left the deck at twelve o'clock. There had been no change in the wind—direction—but it had freshened a little.

Q. 5. Were you on deck at the time of the collision?

A. I was. I got on the deck time enough to turn my attention to the lee bow port side when she took away the port anchor.

Q. 6. How were your sails trimmed at the time of the collision?

A. Close hauled, the same as when I went below.

Q. 7. Can you tell how the Osborn was headed when she struck?

A. No, I cannot; I heard Captain Seamons say to our capt. that he hadn't been below but about 15 minutes, that he gave orders to keep her headed to Beaver Island light.

Q. 8. About how far were you from Beaver Island light when you collided?

A. I should judge about four or five miles, the light was a little abaft the beam. Can't give the directions.

Q. 9. How were your lights?

A. They were burning, and just forward of the mizzen rigging, just forward of the forward shroud of the mizzen rigging.

Q. 10. What other conversation did you hear between the captains?

53 A. I heard Captain Parsons tell Captain Seamons to try his pumps, "Are you sinking?" I then turned to our own pump, took the sounding line and sounded, after that there was a call for a sounding line to sound the pumps of the Osborn. Captain Seamons or his men said he had none. In sounding I believe they found 13 inches of water.

Cross-examination:

Q. 11. How long had you been below when the collision occurred? Did you come on deck before the collision?

A. Had been below about 15 or 20 minutes. I came on deck before the collision. Came on deck just as the collision occurred.

Q. 12. Were you called off from the watch between 8 and 12? If so, for what?

A. I was called off once to have the sheets flat aft; was not called off again, was off this time not to exceed ten minutes. That was about an hour before I went below.

Q. 13. Did you remain up the rest of the night after the collision, and did the vessels drift together before the wind after they collided?

A. I remained up the rest of the night. The vessels drifted together. When we collided a line was passed to and fro from the vessels, and remained so until about eight o'clock. While we were in that situation, and we had our sails still set towing her stern foremost, we were making Fox Island.

Q. 14. How far past Fox Island did the vessels drift in the situation you have mentioned?

A. I can't say that they went past Fox Island. I can't tell how far they did go in that situation.

54 Q. 15. Did you see a propeller lying at Fox Island dock, and did you see Fox Island light while the vessels were thus drifting?

A. I saw a propeller lying side of an island at break of day. I saw the light also.

Q. 16. What direction were you from the propeller at the dock at the time the vessels were separated from each other, and the Osborn taken in tow by the American Union?

A. They were not separated when she was there if my memory serves me right.

Q. 17. Give the positions of the vessels to each other as they drifted, immediately after the collision.

A. What I should call head and stern alongside, fastened head and stern.

Q. 18. What was the position of the vessels as they drifted?

A. I should judge that we drifted sid'wise. The Osborn on her port side; we were making Fox Island, going ahead a little of course; we making Fox Island about daylight when we could see more clearly.

Q. 19. How near did you come to Fox Island, and what part of the island, early in the morning?

A. Some judge it was 4 miles and some 8 miles. I could not say how far it was.

Q. 20. Did the vessels remain fastened together and drifting till about eight or nine o'clock in the morning?

A. I think they did until about that time, when we gave them a large haven, and they fell astern, we towing them; we towed them till about 3 o'clock the next day.

Q. 21. How far from the propeller at the dock were the vessels at the time the change was made from a side to a tow?

55 A. I should judge 'twas ten or twelve miles; we could just see her hull clearly.

Q. 22. How near were you to the propeller at the dock when the vessels were the nearest to the propeller?

A. From 8 to 10 miles. I am a stranger to that part of the lakes and can't tell much about it.

Q. 23. Do you know whether the island where the propeller was was North or South Fox?

A. I can't tell. I could not see the spars of the propeller.

Redirect:

Q. 24. From the time of the collision till morning which way was the sea rolling?

A. The waves rolled from the northwest.

Cross-examination:

Q. 25. Did the vessels drift in the direction the sea was rolling?

A. Of course they always drift.

Redirect:

Q. 26. Did the vessels make headway from the collision till morning?

A. Yes, sir.

Q. 27. Your canvas was still up?

A. Yes, sir.

E. S. OUTIS.

United States district court, northern district of Ohio. In admiralty.

WILLIAM G. WINSLOW ET AL.	} Depositions taken by consent.
vs.	
SCHOONER S. S. OSBORN.	

56 H. L. Terrell appearing for libellants.
Loren Prentiss " " defendants.

ALBERT OUTIS being duly cautioned examined and sworn to speak the truth, the whole truth and nothing but the truth, deposes and says:

Q. 1. State your name, age, occupation, and place of residence.

A. My name is Albert Outis; 20 years old; sailor by occupation; live in Mentor.

Q. 2. How long have you been sailing?

A. Five years off and on.

Q. 3. What vessel did you last sail on?

A. The American Union.

Q. 4. Were you on board the American Union at the time of the collision with the Osborn?

A. Yes, sir.

Q. 4. What voyage was she on at that time?

A. Bound to Escanaba.

Q. 5. What time did you come to an anchor at Sand Bay?

A. It was the night before the collision at 12 or 1 o'clock. We laid there all day till the next night, and got under way again at about 9 o'clock. I remained on deck till 12 o'clock. I don't know what time we rounded the southern point of the island, after we rounded the point and laid our course. I don't remember what it was at the time we rounded the point. I think it was a beam wind at 12 o'clock.

57 When I went below our canvas was trimmed by the wind. It was somewhere 11 o'clock when we hauled them aft. We had starboard tacks aboard. Our sheets were flat aft all the time from 11 to 12 o'clock.

Q. 6. From ten to 12 that night were you either at the wheel or look-out, or were you a spare man?

A. I was a spare man. I was on deck at the time of the collision.

Q. 7. How were your sails trimmed when you came on deck just before the collision occurred?

A. By the wind, sir.

Q. 8. Where was the Osborn when you first saw her?

A. She was about 3 rods off our port bow ahead.

Q. 9. How many points off?

A. I could not say; was not steering the vessel.

Q. 10. Where were you standing on deck at that time?

A. Between the forecastle and foremast.

Cross-examination:

Q. 11. Were you on deck all the while from 8 to 12, and did you go below at 12?

A. Yes, sir.

Q. 12. What called you on deck after you went below, and how soon?

A. I heard the mate call, "Schooner keep away!" I came on deck then. That was from 15 to 20 minutes after I went below.

Q. 13. Where was your vessel at the time you went below with reference to the Beaver Island light?

A. Between 3 or 4 miles toward Escanaba.

Q. 14. How long was it before you went below that you rounded the point of Beaver Island?

58 A. I don't remember; don't think I can tell.

Q. 15. You say that the wind was abeam at the time you rounded Beaver Island. How long did the wind continue abeam?

A. Till about half past eleven or eleven o'clock; might have been before or after. I don't think 'twas any later than half past eleven.

Q. 16. What was the course of the vessel at the time you rounded the island?

A. Don't know; wasn't at the wheel.

Q. 17. Was the course of the vessel changed at or after you rounded the end of Beaver Island, and, if so, what change was made in her course?

A. I don't know. I wasn't at the wheel and did not notice it.

Q. 18. At what time did the wind commence to be abeam, as you said?

A. I can't tell.

Q. 19. Did it (the wind) continue abeam as long as half an hour at least?

A. I don't know.

Q. 20. Were the vessels fastened together, and did the drift before the wind the remainder of the night?

A. Yes, sir; they drifted some.

Q. 21. To what point had they drifted by seven or eight o'clock next morning?

A. I don't know what point it was.

Q. 22. Could you see the southerly end of South Fox in the morning?

A. I could see Fox Island; don't know which Fox it was.
 59 Q. 23. Did you see a propeller lying at the dock at Fox Island in the morning before the vessels were unfastened from each other?

A. Yes, sir.

Q. 24. How far were the vessels from this dock at the time they were separated in the morning?

A. Couldn't answer that question; don't know, sir.

Q. 25. How near did the vessels go to this propeller at the dock when they were drifting?

A. Well, it might have been 3, 4, or 5 miles; can't say.

Q. 26. Did you look to see whether you could see the spars of the propeller?

A. No, sir; I did not pay any attention to it.

ALBERT S. OUTIS.

United States district court, northern district of Ohio. In admiralty.

WILLIAM G. WINSLOW ET AL.	} Depositions taken by consent.
rs.	
SCHOONER S. S. OSBORN.	

H. L. Terrell appearing for libellants.

Loren Prentiss " " defendant.

GEORGE MAGLEY being duly examined, cautioned, and sworn to speak the truth, the whole truth, and nothing but the truth, deposes and says:

Q. 1. State your name, residence, occupation, and age.

A. My name is George Magley; reside in Painesville, O.; am sailor by occupation, and 25 years old; have been a sailor for two seasons before the mast.

60 Q. 2. What vessel were you on last month?

A. The American Union. I was on her at the time of the collision with the S. S. Osborn.

Q. 3. State where the American Union was bound, and the circumstances of the collision as far as you know them.

A. She was bound for Escanaba; she was light. The day before the collision the American Union lay at anchor at Sand Bay. We got under way about one o'clock in the morning; that's the time we let go; we got under way about 9 o'clock the next night; we were bound for Escanaba. I came on deck at 12 o'clock at night. I took the wheel then; we were then abreast of the Beaver Island light. I was ordered to steer full and by. I steered her full and by. The wind was about northwest by north. There was no change in the wind from that time on up to the collision. There was no change in our course; we were heading due west; we had starboard tacks aboard. Our lights were burning and were forward of the mizzin rigging. Did not see the lights of the Osborn myself. There was a nice little breeze. We were sailing about 7 miles an hour. Our sails were flat aft. I heard no conversation between the captains after the collision. When I came on the deck at 12 o'clock the vessel was heading west; her course was full and by.

Q. 4. How far could the canvas of a vessel have been seen that night at the time of the collision?

61 A. About a mile and a half or two miles, I should think ; may be farther.

Q. 5. About how was the Osborn heading when it struck you ?

A. I couldn't tell; she struck us on our port bow.

Cross-examination :

Q. 6. How near did you go to Beaver Island in passing the island ?

A. Went about seven or eight miles. I don't know whether we could have gone closer to the island or not.

Q. 7. Did the vessels drift before the wind after the collision ?

A. Yes, sir.

Q. 8. What time was it when they separated ?

A. It was about seven o'clock in the morning when they got apart.

Q. 9. Did you see any vessels or boats near you in the morning ?

A. Yes, sir. I see one off near Fox Island.

Q. 10. How far were the vessels at that time from the boat that you saw ?

A. We were ten miles I should think from that one. It was a sail vessel sailing along.

Q. 11. Did you see a propeller at the docks at Fox Island as you passed ?

A. Yes, sir; I did.

Q. 12. How near did you pass to the propeller ?

A. About eight miles, I should think; somewhere about that.

Q. 13. How far did the vessels drift together beyond the point where you were at the time that you saw the propeller at Fox Island ?

62 A. I should say about ten miles. I don't know how far.

Q. 14. Did you see the Fox Island light in the morning ?

A. I don't remember of seeing it, sir. I don't know where this light is.

Q. 15. How near did you go to the dock at Fox Island when you passed the island ?

A. Well, I couldn't tell how near, I am sure. It might have been eight miles or farther. I could see the propeller at the dock, but could not see the dock. I didn't see her spars.

Q. 16. At the time the vessels separated after passing Fox Island, in what direction from you was Fox Island ?

A. I couldn't tell you exactly in what direction the island was. I could see Fox Island, but can't tell in what direction it was.

Q. 17. Was the captain below when you went on deck at 12 o'clock ?

A. I don't know whether he was or not.

Q. 18. How soon after you went on deck did you see him ?

A. I didn't see him till the collision was.

Q. 19. What time did you go below that night, and were you on deck after you went below till 12 o'clock ?

A. I went below at 8 o'clock I was not on deck again before 12 o'clock. I believe on reflection it must have been about 10 o'clock when I went below. I assisted in getting the vessel under way before I went below.

GEORGE MAGLEY.

63 The United States district court, northern district of Ohio. In admiralty.

WILLIAM G. WINSLOW ET AL. }

vs.

SCHOONER S. S. OSBORN. }

} Depositions taken by consent.

H. L. Terrell appearing on behalf of libellants.

Loren Prentiss " " " " defendants.

FRANK WICKS being duly cautioned, examined and sworn to speak the truth, the whole truth, and nothing but the truth, deposes and says:

Q. 1. State your name, age, occupation and place of residence.

A. Frank Wicks; 22 years; sailor by occupation; reside in Mentor; have been a sailor for four years before the mast. Last sailed on the American Union. I was aboard the American Union at the time of the collision with the S. S. Osborn.

Q. 2. What voyage was the American Union on at the time of the collision?

A. She was bound for Escanaba.

Q. 3. State what you know in regard to the collision?

A. We anchored Thursday night off Sand Bay, at one o'clock. We weighed anchor about nine o'clock Friday night. I assisted in this and went below till 12 o'clock; went below about 10 o'clock, came on deck again at 12 o'clock. The vessel was then off Beaver Island light, four or five miles off. I had no particular post assigned me. Our sails were trimmed flat aft by the wind. We had starboard tacks aboard. The 64 wind was at that time I should think from the way she was heading about northwest by north. I did not look at the compass. Didn't know, but should think she was headed about west. From that time on till the time of the collision there was no change in the wind or course of the vessel. I saw the Osborn about five minutes before she struck. I heard the lookout say before that that he saw the light. She was right off our lee bow a couple of points. I should think when I first saw her she was then showing a green light. I can't tell what direction she was going when she struck us I couldn't tell the course, but from the way we were heading I should think she was heading about northeast. She tore our flying jib; did not injure our fore sail or main sail. Our lights were at the time of the collision and a half hour previous thereto situated a little forward of the mizzen rigging. They were both burning. The collision occurred about four or five miles from the Beaver Island light. I could not say in what direction the Beaver Island light was at the time of the collision.

Cross-examination:

Q. 4. How near was your vessel to the Beaver Island light when you came on deck?

A. In the neighborhood of four miles.

Q. 5. How soon after you came on deck did the collision occur?

A. I should say somewhere about 15 minutes; can't say exactly.

65 Q. 6. What part of the vessel were you on when you came up, till the time of the collision?

A. I stood most of the time by the gallant fore-castle, forward.

Q. 7. Who was on the lookout?

A. Robert Mott.

Q. 8. How near were you to him?

A. I was within ten or fifteen feet of him.

Q. 9. Did you see the light of the Osborn before the lookout called out?

A. No, sir.

Q. 10. Which side of the vessel were the sails on when you went below?

A. They were on the port side, starboard tacks aboard.

Q. 11. Was she going before or by the wind when you went below?

A. She didn't have her sheets flat aft nor off very far; the wind was a little free.

Q. 12. Have you any means of knowing the course of either vessel at or just before the collision?

A. I don't know, only from what I heard them say; I did not look at the compass, and couldn't tell exactly.

Q. 13. Were the vessel/s fastened together fore and aft immediately after the collision?

A. I think the first line got aboard the Osborn was about midships; they were afterwards fastened together.

Q. 14. Did the vessels thus fastened together drift before the wind till seven or eight o'clock next morning?

A. Yes, sir; somewhere near that time.

Q. 15. To what point did they drift before they were unfastened and their positions changed?

66 A. Well, I don't remember now whereabouts it was; I didn't pay much attention to that.

Q. 16. Did you see a propeller lying at a dock at the southerly end of Fox Island that morning?

A. I saw a propeller at the dock; can't say where it was; am not much acquainted there.

Q. 17. Which way, and how far from the propeller at the dock were you at the time you saw it?

A. Well, we could just see her right astern of us; I didn't see a propeller until after we took the Osborn in tow.

Q. 18. Was there any one at the wheel of the Union after the collision, and during the night?

A. Well, I think there wasn't, part of the time at least; there was some one there part of the time, and part of the time no one, while they were hitched together.

Q. 19. Did you hear any orders given during the time they were fastened together and drifting, to the man at the wheel?

A. No, sir; orders might have been given and I not hear them.

Redirect:

Q. 20. Was your canvas kept standing from the time of the collision on till morning?

A. Yes, sir; we hauled down one flying jib, it was torn; I think also the fore gaff topsail.

Q. 21. State whether you heard any conversation between the captains of the two vessels?

67 A. I saw Captain Parsons go aboard the Osborn, and show Captain Seamons our light. Captain Parsons asked him if he could see our lights, and he said he could; then he went aft on the quarter of the Osborn, and told him he could see them standing right there; the quarter of the Osborn then with respect to our vessel, was a little forward of the fore rigging; they were then hitched together.

FRANK WICKS.

Q. 1. State your name, age, occupation, and place of residence.

A. My name is Thomas G. Gilkison; 28 years old; am sailor by occupation; Hamilton, Ont.

Q. 2. How long have you been sailing, and in what capacity?

A. Have sailed 22 years, and in all capacities except captain.

Q. 3. Were you on board the American Union at the time of the collision with the Osborn?

A. Yes, sir.

Q. 4. State when you were at the wheel.

A. I was at the wheel from 10 to 12 that night, Friday the ninth.

Q. 5. State what time you rounded the point of Beaver Island?

A. I can't say exactly what time we rounded the south point of Beaver Island; we hauled our sheets between eleven and twelve; should think about half-past 11, or fifteen minutes of 12.

68 Q. 6. From the time her sheets were hauled flat aft, as stated, till the time you left the wheel, how was the vessel sailing?

A. The vessel was heading west; I had no course, sir; her course was full and by; that I got from Captain Parsons.

Q. 7. How was the wind during the same time?

A. The wind was about northwest by north; the wind was steady; it was steady for the fifteen minutes before I left the wheel, for I kept her due west; if there had been no sea on I could have lain a little higher than that; take that vessel with no sea on she would lay half a point higher, and make considerable headway; that's within four and a half points of the wind.

Q. 8. Which way was the sea making when you left the wheel?

A. The sea was making from the northwest.

Q. 9. Were you on deck at the time of the collision?

A. I was, sir.

Q. 10. Did you see the Osborn before she struck?

A. I saw her before she struck.

Q. 11. Well, how did she bear when you first saw her?

A. When I first saw her she was bearing fair and square on our port bow; when I went below at 12, I heard the mates sing out "Schooner ahoy, keep off," and that's what brought me on deck; just as I was about on deck, the mate cried out, "look out for a collision below there."

Q. 12. You may state where your lights were placed that night, and whether they were burning or not.

69 A. They were placed just forward of the mizzen rigging; they were burning.

Q. 13. State what, if anything, there was to obstruct the view or hide them from a vessel approaching, as the Osborn was?

A. Nothing whatever.

Q. 14. How were your sheets when you came on deck just before the collision?

A. They were flat aft, sir. They were hauled aft between eleven and twelve o'clock, and they were kept that way.

Q. 15. State whether you heard Captain Seamons say anything after the collision.

A. After we found out we were not sinking, Captain Parsons went aboard the Osborn and called his attention to our red light, and Captain Parsons asked him if he could see that red light, and if it wasn't burning prettily. Captain Seamons said he could see it, and it was burning all right.

Q. 16. How far were you from Beaver Island light when the collision occurred?

A. About five or six miles, I should think. I saw Beaver Island light before I went below.

Q. 17. How long after the collision did you first notice Beaver Island light?

A. About half an hour; it could be seen all the time if one looked for it.

Q. 18. Well, how did it bear before you went below?

A. I could not say, sir; I did not take the bearing of it.

Q. 19. How was the wind, and how was the sea making after the collision?

70 A. The sea was making from the northward and westward, and the wind was northwest by north. When the Osborn was alongside she kept falling off, and got into the trough of the sea, and there she lay, with the wheel lashed head aport.

Cross-examination:

Q. 20. Which side of your vessel were the sails on when you left Sand Bay?

A. They were on the port side, sir.

Q. 21. How long did they continue in that position?

A. Till between eleven and twelve o'clock.

Q. 22. Were you sailing by or before the wind when you left Sand Bay?

A. We were running free, sir. Q. 23. We run that way till the sheets were hauled aft. The sheets were checked in a little before I went to the wheel, and were hauled flat aft while I was at the wheel.

Q. 24. How free did you have the wind when you were coming down from Sand Bay?

A. Between 2 and 3 points; somewhere about there.

Q. 25. And up to what point did it continue in that position?

A. Till we hauled our sheets aft, between 11 and 12.

Q. 26. Were the sheets hauled flat before you changed your course to due west?

A. Our course was full and by, the vessel heading west. I was steering full and by. After the sheets were aft and she was heading west, I was not steering by the compass.

THOMAS G. GILKISON.

71 Also ALEX. STEWART, who being duly cautioned, examined, and sworn, deposes as follows:

Q. 1. State your name, age, occupation, and place of residence.

A. My name is Alex. Stewart; 32 years old; sailor by occupation; reside in Buffalo.

Q. 2. State how long you have been a sailor, and in what capacity you have sailed?

A. Have sailed about fourteen years; seaman mate, and sailing yacht for the last five or six years.

Q. 3. State on what vessel you are now sailing, and in what capacity?

A. Have been sailing on the barque Nelson as mate.

Q. 4. State, if you remember, the night of the collision between the American Union and the S. S. Osborn.

A. I can't tell what night it was. Yes, sir; I remember the night of the collision. I don't remember the day of the week nor the day of the month. I was on the Nelson the night of the collision between the Osborn and the American Union.

Q. 5. State on what voyage the Nelson was that night, and where she was from eight o'clock in the evening till 2 in the morning.

A. She was from Escanaba to Cleveland, with ore, and from 8 to 12 that night was in the passage from Rocky Island passage to the Beavers.

Q. 6. State what time the Osborn left Escanaba that day, and what time the Nelson.

A. The Osborn left some time in the forenoon and the Nelson left a little after noon; can't say exactly what time.

Q. 7. Where did you last see the Osborn that night before darkness came on?

72 A. I should think about seven or eight miles to windward and ahead of us before dark. This was before we came out of the passage.

Q. 8. State how long you were in running from Rocky Island passage to Beaver Island that night?

A. Between six and seven hours.

Q. 9. State, if you know, the distance.

A. No; not exactly.

Q. 10. In running from Rocky Island passage to Beaver Island that night, state how you had the wind, free or otherwise?

A. I don't know how the wind was from eight to half past eleven. At half past eleven o'clock I know the wind was free.

Q. 11. When did your watch on deck begin?

A. At 12 o'clock; I came on deck at half past 11.

Q. 12. You may state, from the time you came on deck at half past eleven till the time you reached Beaver Island, how you had the wind, whether free or otherwise?

A. The wind must have been free, for when we saw South Fox light we thought we were to leeward of our course, and hauled her up on the wind, and she came up northeast.

Q. 13. How close to the wind can the Nelson sail?

A. About six points.

Q. 14. When you hauled her upon the wind, how far up did you haul her, and how were her sails trimmed?

A. We let her come up to the wind till she came up northeast, and we thought that was a little too high, so we kept her off east northeast.

73 Q. 15. When you hauled her up northeast how were her sheets?

A. The sheets were about 3 points off; the wind slacked off apiece. No; before we started to bring her up to the wind her sheets were about 3 points off the wind. But when we brought her northeast we let the braces go forward, and the mainsail shook them, and when we kept her away east, northeast, we flattened the mainsheet aft a little, and left the braces stand as they were.

Q. 16. State whether at any time you hauled her sheets flat aft?

(Objected to by defendant.)

A. Yes, sir; we hauled them flat aft at about two o'clock, when we hauled around the head of the Beaver.

Q. 17. State whether or not, at the time you have spoken of when you let her come up northeast, the sheets were hauled flat aft?

(Objected to by defendant.)

A. No.

Q. 18. From 12 till 2 that night what was the direction of the wind?

A. I couldn't tell exactly to the point. But when we hauled her by the wind, at about two o'clock, the wind must have been north, northwest.

Q. 19. State whether, knowing your course from twelve till two, and the manner in which you had your canvas trimmed, and that you had the wind free, you were able to tell about where the wind was during that time; and, if so, where was it?

(Objected to by defendants.)

A. Well, the wind must have been a little beaft the beam from the way we were steering.

74 Q. 20. How were you steering from half past eleven to one o'clock?

A. About east, northeast.

Q. 21. From half past eleven till one o'clock how did you have the wind, free or otherwise?

(Objected to by defendant.)

A. The wind was a little free.

Q. 22. From half past eleven till one o'clock did you have the wind forward of the beam, abeam or abaft the beam?

(Objected to by defendant.)

A. Well, the wind must have been—couldn't exactly—a little beaft the beam. We didn't watch the wind to a point; as long as the wind was good and free we didn't pay much attention to it—where it was exactly.

Q. 23. What sort of a night was that?

(Objected to by defendants.)

A. It was kind of a dirty, dark night—not very. The first part of the night was dirty and dark, but after twelve o'clock it cleared up.

Q. 24. At any time after twelve o'clock that night how far could the canvas of a vessel have been seen if full spread?

(Objected to by defendant.)

A. I don't know exactly; about a mile or so.

Cross-examination:

Q. 25. Where was your vessel at the time you went below at 8 o'clock?

A. We had just got through Rocky Island passage.

75 Q. 26. What course was your vessel then steering?

A. The captain shaped his course at 8 bells east, a half north, to the best of my knowledge; that is the course he gave them. I did look at the compass. I don't call that examining. I know from my own knowledge that that was the course of the vessel at that time.

Q. 27. What was the shape of your sails at that time?

A. Hauled flat aft then.

Q. 28. Do you know anything about the course of the wind or of the vessel from that time till half past eleven?

A. No, sir.

Q. 29. When you came on deck did you look to see what time it was?

A. Yes, sir; I looked at the clock; it was half past eleven.

Q. 30. How soon after you came on deck did you notice the course of the vessel?

A. That was the first thing I looked at when I came on deck to see how she was going.

Q. 31. What was the course of the vessel when you came on deck at half past eleven?

A. I believe she was heading about east by north then.

Q. 32. What was the position of her sails then?

A. Her sheets were eased off then.

Q. 33. How long did she continue on that course?

A. We hauled her up on the wind a little after that. I can't tell exactly to minutes how soon; in about a quarter of an hour or so we hauled her up all she would come. She came up to northeast.

76 Q. 34. How long did she continue on the course of northeast?

A. We didn't keep her any time at all hardly; we put her then east, northeast.

Q. 35. What condition were her sails in when she came up northeast?

A. Her braces were let right forward then; that's what we call by the wind, and the mainsail shook. Her mainsails shook because they were not flat aft. She continued east, northeast, till about one o'clock as near as I can remember.

Q. 36. What time did you pass Beaver Island light, and how far from it?

A. We passed it about two o'clock, and about from a mile and a half to two miles off. I forget now whether the man at the wheel was relieved at 4 bells. I think he was and helped me brace her up.

Q. 37. What day of the month was this?

A. I don't know, sir.

Q. 38. Did your vessel take the direct passage to Beaver Island light?

A. She did, to the best of my knowledge.

Q. 39. What time did the night clear up?

A. About midnight it commenced to clear up. I can't tell exactly what time. It was getting cleared up when we were off Beaver Island light.

Q. 40. Immediately after you passed Beaver Island light, what was the course of your vessel, and to what place?

A. After we passed the light she was making a northeast course, and a little before four o'clock she broke off northeast, a half east, Skillikeln Island; then bore about a point off the weather bow.

77 Q. 41. What was the condition of your sails from the time you passed Beaver Island light till you bore off Skillikeln Island.

A. The sails were flat aft till four o'clock; I don't know how they were after that; we sailed by the wind from the time we left Beaver Island light.

Q. 42. Did the wind change any after you came on deck at half past eleven till four o'clock?

A. Well, it might have veered around a little; there wasn't much difference, though.

Q. 43. Did you not have a conversation with Captain Seamons on the dock in the city of Cleveland immediately after the vessels arrived at Cleveland, and did you not in that conversation tell him that your vessel was close hauled all the way the night of the collision of the Osborn and American Union?

A. I had a conversation with him; but I don't know as I told him that; I didn't want to be roped into this thing at all, and might have said things that I didn't mean; I believe I had another conversation with him, and told him it wouldn't do him any good to have me hauled up.

Q. 44. Are you acquainted with Captain Parsons of the American Union, and have you not had repeated conversations with him in reference to the collision, before coming here to testify?

A. I don't know as I ever saw the man before yesterday in my life, and he never spoke to me before yesterday about the collision, on anything else; he asked me yesterday if I wouldn't come up and

78 give a kind of a statement how I was running that night. Captain Seamons told me before, the last time that I was here, that I might have to come up and give a statement how I was running that night; I did not have any kind of a conversation with Captain Parsons about how I was running.

ALEX. STEWART.

ALBERT LANDRETH being duly examined, cautioned, and sworn to

speak the truth, the whole truth, and nothing but the truth, deposes and says:

Q. 1. State your name, age, occupation, and place of residence.

A. My name is Albert Landreth; I am 28 years old; I am cook on the lakes; reside in Cleveland.

Q. 2. How long have you been cooking on the lakes?

A. Thirteen years.

Q. 3. What vessel was you last cooking on?

A. The American Union.

Q. 4. Were you on the American Union at the time of the collision with the S. S. Osborn?

A. I was.

Q. 5. State whether you were on deck at the time of the collision?

A. I was on deck about five minutes before the collision; I wasn't on deck over five minutes; I had gone below and just got into bed when I heard the vessels strike.

Q. 6. What were you doing on deck?

79 A. I went on deck to take a look around.

Q. 7. When you were on deck how was the vessel sailing?

A. The vessel was heading due west.

Q. 8. State how the canvas was trimmed?

A. They were trimmed close aft, with starboard tacks aboard.

Q. 9. Where was the wind?

A. The wind was northwest by north.

Q. 10. When were you on deck last, before the time you speak of?

A. About 8 or 9 o'clock.

Q. 11. You may state how you know your course was due west.

A. I looked in the compass, and also looked up to see how the fly was tailing.

Cross-examination:

Q. 12. How far were you from the Beaver Island light at the time you came on deck referred to?

A. I should say somewhere between five and ten miles; I did not notice the light till after the collision.

Q. 13. Were you west of North Fox Island?

A. Yes, sir; we were; couldn't say how far west; I didn't notice it.

Redirect:

Q. 14. How did Beaver Island light bear from you after the collision?

A. I did not notice it.

ALBERT LANDRETH.

UNITED STATES OF AMERICA,

Northern District of Ohio, ss:

I, Clifton B. Beach, a notary public duly appointed as hereinbefore stated, do hereby certify that the reason for taking the foregoing
80 deposition is, and the fact is, that the testimony of Charles O. Ingraham, Edward Ingraham, E. S. Outis, Albert Outis, George Magley, Frank Wicks, Thomas G. Gilkison, Alexander Stewart, and Albert Landreth, is material and necessary in the cause, the title whereof is in the caption of said deposition named, and pending in the district court of the United States for the northern district of Ohio, and that the said witnesses are, all of them, seafaring men, and about to depart on a voyage to sea. I further certify that depositions were taken by consent. I further certify, that on the 26th day of August, in the year of our

Lord one thousand eight hundred and seventy-two, I was attended by Loren Prentiss, proctor for said defendant, and by the witnesses aforesaid, who being of sound mind and of lawful age, and the witnesses being by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, and their depositions being by me reduced to writing in the presence of the witnesses aforesaid, and from their own statements, and after carefully reading the same to the witnesses, they subscribed the same in my presence.

I have retained the said deposition in my possession for the purpose of sealing up and directing with my own hand to the court for which the same were taken; and I certify that the same will be retained by me until I shall deposit the same with my own hand, sealed up and directed as aforesaid, in the post-office at Cleveland, Ohio, the place where the said depositions were taken; and I do further certify, 81 that I am not of counsel or attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof I have hereunto set my hand, this first day of October, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States of America the

CLIFTON B. BEACH,
Notary Public for said County.

UNITED STATES OF AMERICA,

*Northern District of Ohio, City of Cleveland,
County of Cuyahoga and State of Ohio, ss:*

Be it remembered that on the 29th day of July, A. D. 1874, I, L. M. Schevan, a commissioner duly appointed by the circuit court of the United States for the northern district of Ohio, in the sixth circuit, under and by virtue of the act of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States, passed February 20, 1812, and the act of Congress entitled "An act in addition to an act entitled act for a more convenient taking of affidavits and bail in civil causes pending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts 82 of the United States," passed Sept. 24, 1789, did call and cause to be and personally appear before me at my office, at No. 81 Public Square, in the city of Cleveland, in the said northern district of Ohio, in the State aforesaid, John McCoy, to testify and the truth to say, on the part and behalf of the complainant, in a certain suit or matter of controversy now pending and undetermined in the district court of the United States for the northern district of Ohio, wherein William G. Winslow et al. are complainants, and the schooner Osborn, respondent, and the said John McCoy, being about the age of 37 years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said JOHN MCCOY, and he did thereupon depose, testify, and say as follows:

Q. 1. State your name, age, residence, and occupation.

A. My name is John McCoy; age, 37 years; residence, Milwaukee, Wis., and occupation, that of a sailor.

Q. 2. How long have you sailed, and in what capacity?

A. I have sailed about 16 years; ever since 1857. I have sailed in all capacities. I have been master for two years. I am now master of the barque Nelson—tonnage, 462; registry, carries over 800 tons.

Q. 3. On what vessel were you sailing in the season of 1872, and in what capacity?

A. On the barque Nelson, as mate, up to the month of August, and master the balance of the season. The collision between the Osborn and American Union occurred during my first trip as master of the Nelson.

Q. 4. At the time of the collision between the Osborn and American Union, on what voyage were you, and where were you?

A. On that trip the Osborn left Escanaba just a little ahead of us—perhaps an hour ahead of me—perhaps an hour ahead of me into Lake Michigan. At 12 o'clock that night we were about ten miles from Big Beaver.

Q. 5. At about half-past eleven where were you and what did you then do?

A. We were off back of North Fox to the leeward of the track, and then we hauled the Nelson close by the wind on her port tack; she headed up northeast by north. The wind was baffling and the night was dark. We came up within about $5\frac{1}{2}$ points of the wind, which would make the wind NW. by N. $\frac{1}{2}$ N. Sometimes we baffled between NE. by N. & NE., making the wind baffling between NW. by N. and NNW.

Q. 6. From half-past eleven to half-past twelve that night did the wind shift any, and, if so, did it go to the westward or northward?

A. I know that it did not go to the northward; if anything it went to the westward. The wind did not get further north than NNW. I am certain of that. My best judgment is that the wind between the hours spoken of was NW. by N. $\frac{1}{2}$ N.

Q. 7. In which way was the sea running that night, and what effect did it have?

A. About from the NNW., and had a tendency to throw *as* to the leeward.

Q. 8. How do you know that this was the night the collision occurred between the Osborn and the American Union?

A. I know it was about the 9th of August, 1872, and that the Nelson and Osborn left Escanaba nearly together that afternoon, and that I saw her on Lake Michigan at dark, eight or ten miles to the windward of us. The next morning I couldn't see anything of the Osborn, but when we got into the Detroit River, and while we were laying at Detroit, she towed past us in a disabled condition, and when we arrived at Cleveland I saw her captain, and he told me of the collision.

Q. 9. Where are you to be the balance of the season?

A. The vessel belongs in Milwaukee, and I generally said between Milwaukee and Buffalo and Detroit, and sometimes Chicago. My address is No. 498 Mineral st., Milwaukee, Wis.

JOHN MCCOY.

UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

I, L. M. Schevan, a commissioner duly appointed by the circuit court of the United States for the sixth circuit, northern district of Ohio, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes pending in the courts of the United States," passed Feb. 20th, 1812, and the

act of Congress entitled "An act in addition to an act entitled an

act for the more convenient taking of affidavits and bail in civil causes pending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, that the testimony of John McCoy is material and necessary in the cause, the title whereof is in the caption of said deposition named, and pending in the district court of the United States for the northern district of Ohio. I further certify that the above deposition was taken by the consent of the parties hereto.

I further certify that on the 29th day of July, in the year of our Lord one thousand eight hundred and seventy-four, I was attended by H. L. Terrell, esq., counsel for complainant, and by the witness aforesaid, who was of sound mind and of lawful age, and the witness was by me first carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and his deposition was by me reduced to writing in the presence of the witness aforesaid, and from his own statements, and after carefully reading the same to the witness he subscribed the same in my presence.

I have retained the said deposition in my possession for the purpose of sealing up and directing the same with my own hand to the court for which the same was taken; and I certify that the same will
86 be retained by me until I shall deposit the same with my own hand, sealed up and directed as aforesaid, in the U. S. clerk's office at Cleveland, O., the place where the said deposition was taken. And I do further certify that I am not of counsel or attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the caption.

In testimony whereof I have hereunto set my hand this 29th day of July, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States of America the 98th.

L. M. SCHWAN,

*U. S. Commissioner, duly appointed by the Circuit Court
of the United States for the 6th Circuit
and Northern District of Ohio.*

In the U. S. district court within and for the northern district of Ohio.

THE STATE OF OHIO,
Cuyahoga County, ss:

H. J. WINSLOW AND WM. G. WINSLOW,	}
plaintiffs,	
<i>against</i>	
THE SCHOONER S. S. OSBORN, DEFEND-	}
ant.	

The respondent will take notice that on Friday, the 19th day of February, A. D. 1875, the above-named libellants will take the deposition of John Debbage, Thos. Banner, and Wm. Bain, sundry witnesses
87 to be used as evidence on the trial of the above-entitled cause, at the office of U. S. Commissioner Gorham, in the city of Buffalo, county of Erie, and State of New York, between the hours of eight o'clock a. m. and 6 o'clock p. m. of said day, and that the taking

of the same will be adjourned from day to day, between the same hours, until they are completed.

WILLEY, TERRELL AND SHERMAN,
Attorneys for Libellants.

I acknowledge service of the above notice by copy this 15th day of February, 1875.

PRENTISS AND VARCE,
Attorneys for Cross Libellants.

United States district court, northern district of Ohio. In admiralty.

HEZEKIAH J. WINSLOW AND WILLIAM G.	}
Winslow	
<i>vs.</i>	
THE SCHOONER S. S. OSBORN, HER tackle, &c.	

Depositions of sundry witnesses taken before me, George Gorham, U. S. commissioner within and for the county of Erie, northern district of New York, on the 19th day of February, 1875, pursuant to the annexed notice, to be read in evidence on behalf of the libellants in the above-entitled action. Mr. B. H. Williams, counsel for the libellants; Mr. C. M. Varce, counsel for the respondent.

88 THOMAS BANNER sworn, cautioned, and examined, said:

I am forty-seven years old. I live in Buffalo. My occupation is sailing. I have been a sailor since I was twelve years old. I have sailed as master since 1861, with the exception of one season when I was mate. I have been sailing on the lakes for the last twenty-two years. I was sailing as master in the season of 1872. I was then master of the schooner Eagle Wing. The schooner Eagle Wing was lying at anchor at Beaver Islands on the nights of the 9th and 10th of August, 1872. We were bound from Detroit to Escanaba. We anchored on Beaver Islands between six and seven o'clock in the evening of the 9th August, 1872. We remained at anchor there till daylight on the morning of the 10th. About eleven o'clock that night I was on deck; the wind was then under the Islands about northwest. We came to anchor because the wind was ahead and squally, so far ahead I couldn't sail my vessel.

Cross-examined:

I came up on deck about eleven o'clock p. m.; I remained on deck probably three or four or five minutes. We anchored on the lee of the Beaver, about four miles to the northward of the light-house, about two or three miles off shore, and perhaps not quite so far. We remained at anchor till about daylight. It may have been six o'clock when we got under way. When we started the wind was about northwest by north. When we anchored I saw a vessel laying at anchor in Sand Bay, but I could not tell what vessel it was. It was squally. It was squally when we came to anchor, and that lasted half an hour or so, and we had no more squalls that night. I do not recollect whether it rained during the night or not. The wind at eleven o'clock was too scant for me to start out then for Escanaba. My vessel was light. I did not see the American Union when she went out from Sand Bay. The watch said next morning that a vessel passed out, but they could not tell what it was.

I think we arrived at Escanaba the next evening, but I could not be positive. I could not tell the hour of day we arrived there.

I anchored under the Beaver twice afterwards that same season, once in Sand Bay and once nearer the harbor. The harbor is about north-westward of the island.

I anchored in Sand Bay along towards the fall—I think it must have been about the first of November I anchored near the harbor that same trip. I got under way and went back again. I can't give the exact day when I anchored in Sand Bay. The wind was about SW. I was then bound for Escanaba too. I came up too close under the harbor one night about nine o'clock and lay there till next forenoon, got under way and came to anchor in Sand Bay that same night. The wind was from W. to SW. all the time. I got under way thinking I could beat off. The wind, as near as I can get at it was from SW. to

W. I did not keep a regular log book that year. I fix the exact 90 day when I anchored under the Beaver, because I remember hearing them speak about it and I saw the American Union come into Escanaba. I got to Escanaba first.

The wind might have been a little further to the north than NW. but it was a little baffling under the island. You can tell within a point and a half or two points how the wind was off to the westward of the island from where I was. The chart course from the head of the island to Waugochance light is about NE. $\frac{1}{2}$ E. A northwest wind is a fair wind to sail that course. There would be no difficulty in sailing NE. or ENE. with a northwest wind. I did not have a conversation with Captain Seamons in regard to the course of the wind that night. I did not to my knowledge tell Capt. Seamons. I could not tell the course of the wind that night because I was not on deck. I talked with Captain Parsons about the course of the wind when he came in to Escanaba that trip. That was the same day Parsons came in. I could not say exactly how quick it was.

I don't know that I have talked with him since, on that subject. He spoke to me about it to-day and asked me if I knew how the wind was at that time. Captain Parsons is present. I sailed the schooner Thomas P. Sheldon last season. I expect to sail the same vessel the coming season. In 1873 I sailed the Sheldon. Fish and Brown, and Fish & Armstrong own the Sheldon. Neither of the Winslow's have any interest in the Sheldon.

Re-direct:

We lay waiting for the weather to clear up.

91 Re-cross:

When we got under way the wind was about NW.

Re-direct:

When I went on deck that night I should think there was a whole sail breeze.

THOS. BANNER.

Subscribed and sworn to before me February 19th, 1875.

GEO. GORHAM,
U. S. Commissioner.

JOHN DEBBAGE, sworn, cautioned and examined, said:

I live in Oswego. I am fifty years of age. I am a sailor. Have been sailing about forty years. Have sailed on the lakes twenty-three seasons. Have sailed as master for the last five years, and before that

I sailed as master 35 years ago in England; some 10 or 12 years ago I sailed as master part of a season. In season of 1872 I was sailing as master of the barque John P. March, of Chicago. On the 9th or 10th of August I am not positive which, but it was the night of this collision, I passed the American Union about six or seven o'clock in Sand Bay. She was at anchor. I was going to Chicago from Cleveland. I went right along. About this time the wind changed from south and blew NW. or NW. by N. and blew pretty fresh. It rained a little when the wind first changed. The wind continued in that direction till about eleven o'clock. When I arrived at the Fox's, and then it hauled a little more to the westward, about 2 points away making it about NW.

92 by W. at midnight, my impression is that it hauled a little to the northward, after I got past the Foxes' and then blew about NNW. and after that it gradually worked to the north as it cleared off. I passed through a streak of fog from about nine to eleven, and then it cleared about eleven and was clear at midnight. At midnight it was blowing about 7 to 8 knot breeze. The South Fox is about 25 miles from Beaver Island, Sand Bay.

Cross-examined:

I passed west of the Manitous. The chart course from Beaver is about SW. by south to the head of the Fox. I left Cleveland on that trip. I don't exactly recollect when, three or four days before this. I did not come to an anchor under the Beaver, I passed right on up without coming to an anchor. I passed within two or three miles of the American Union. Did not see Skillagalee light at all. We made the light-house about four o'clock that afternoon. Had been beating all day pretty much. Had run tacks of three or four miles. The wind was no better till it shifted. I was on deck all day that day, and till twelve o'clock that night except meals, &c. The wind had been substantially ahead till about seven o'clock, and at that time I was standing toward Beaver Island, Sand Bay where the American Union lay. It shut down dark a little after 8 that night. I stood in to about three miles of the beach. I saw indications of the wind changing, and went around, as soon as I got the wind I stood on the course SW. about, and this
93 was before eight o'clock, I anchored off the Beaver and about half way over to the Foxes, where I got into the fog.

The wind was steady till about half past eight or nine, and at that time I was just passing the Foxes. After I passed the Foxes it hauled ahead a little, and then it was steady about an hour. At this time the fog had cleared. I went through that same passage again several times that season. I went through again in seven or eight days. The next morning at about four I was west of the Manitous, and the wind was then about north. It had been going north the previous two or three hours. When I got in the lee of the North Fox, the wind began to haul ahead a little to westward. As soon as I got four or five miles clear of the Fox it hauled to the northward; again at six o'clock that morning I had the wind NE. I don't recollect how I had the wind seven or eight days later when I went through. My impression it was SW. I don't recollect how it was off the Beaver the next trip coming down. I next saw the American Union at Cleveland, I think, when I arrived there the next trip. The Osborn was in Cleveland the same time. I had a conversation with Captain Seamons, but not with Captain Parsons. Never had any conversation with Captain Parsons about the wind or collision. Have talked with Captain Parsons some of it to-day. I came from Oswego here to testify in this case. I sailed the Mach in 1873 and '74, and I

expect to sail her in 1875. She is owned by Benton and Pearson and myself, we are the sole owners. Neither of the Winslows have any interest in her.

94 The breeze got lighter as we got up the lake, at least I found it so at four o'clock. The chart course from Beaver to Wanguschance is about NE.

Q: From 5 p. m. to 4 a. m. was there any difficulty in laying the course from Beaver to Wanguschance light?

A. No. There was not much sea that night, though there was considerable in the afternoon, quite a sea. The sea was coming from the NW. while we were under the Foxes, after we passed it was making from that direction, but there was very little of it. I fix that particular night because my attention was called to it several times that season, and when I arrived at Buffalo that same trip.

I do keep a diary; did at that time on that trip. If my attention is called to it in the same trip I can tell the wind at any day within a week or ten days. I can't remember all the changes of the wind particularly in a trip, but generally. I made a statement of this matter several times, and my attention has been called to it several times every year.

Redirect:

At twelve o'clock that night my impression is it was a pretty fine clear night. I was then about west of the South Mainou.

JOHN DEBBAGE.

Subscribed and sworn before me February 19th, 1875.

GEO. GORHAM,

United States Commissioner.

WILLIAM BAIN being cautioned, examined, and sworn:

95 I live in Buffalo; I am a seaman, & have been thirty-five years—about thirty-five years on the lakes. I have been master 25 years. I know the schooner American Union; have known her about ever since she was built; I have examined her to see what kind of lights she carried and how they were carried. It was about the middle of November, 1874. The lights were lit about half past six, and the parties who were examining her with me went abeam of the vessel, ahead, and on both beams, and every place that was required to see that her lights showed good. I found them all right. The green light was on the starboard side and red light on the port side. The green light was placed a little forward of the mizzen rigging on the rail and the red light the same on the port side. This was, I believe, on the main rail and secured to the monkey rail. I did not examine very closely as to that. In fact we did not go aboard of her; we went ahead and around. I noticed they were carried in the same place I carry my lights. I observed the lights; they were good lights—I mean good and proper for a vessel of her size. The green light shown abeam, forward of abeam, and directly ahead, and the same with the red light. They had the usual wooden screens.

(The counsel for respondent enters an objection to all testimony in regard to the lights.)

The American Union was lying in the C slip in Chicago at the time of this examination, headed to the southward. I have been a master for 25 years. The majority of vessels carry their lights where this vessel had hers.

And the said CHRISTOPHER F. MOORE testified as follows:

I reside in Detroit; I am a master of tug boats, and have been 18 years off and on. I know the bark American Union. I have towed her in the night. I have noticed her lights when I towed her. She had good lights; have seen her different times; she had always good lights on her.

(Objection made as to testimony as to what lights she had at other times.)

Q. Will you state whether you ever noticed whether you could see both of her lights from dead ahead.

A. Well, no, sir; I don't remember of being in that position. I might have been in that position but cannot say positively, although I may have been half a dozen times. I wouldn't be very positive as to where she carried them, but I have an idea it was forward. We are not particular as to whether they carry aft or forward. Could
101 not tell exactly the number of times I have towed her, but a number of times; could tell by looking at my books a good many years back.

Q. Please state whether, if there had been any difficulty in seeing her lights, you would have noticed it while towing her.

(Objected to as incompetent and leading.)

A. Yes, sir; I would have noticed it right off.

Q. State whether you recollect of ever noticing any difficulty about her lights.

(Same objection.)

A. No, sir; not when I had her in tow.

Q. Can you state occasions when you met her at night?

A. Once after dark, about 9 o'clock, off Cleveland, about 15 miles off; once also in Lake Huron.

Q. What lights was she showing on the occasion of your meeting her off Cleveland?

A. Green light when I first saw her; as I left her I saw a red light.

Cross-examination:

Q. Was it necessary for you to refer to the lights of the Union to guide you in towing the vessel?

A. I always sing out to them when it is time to put up their lights. I could guide myself without the lights of the vessel. We don't care anything about their lights particularly to guide us.

Q. Question repeated.

A. No, sir; I refer to the lights being required to be out when towing her. I can steer my boat without them.

Redirect:

102 Q. State whether or not it is necessary for you to notice the lights of a vessel to determine whether she is following you or not.

(Objected to as incompetent and leading.)

A. Yes, sir. It is the only way we can find out on a dark night. It is the only thing we can see of them.

Q. On a dark night how do you determine whether a vessel is following you well or not?

A. By her lights. If one or more of the vessels in tow should take a sheer off you would see but one light, either red or green.

Q. What is the test of a vessel following you well on a dark night? What are the lights?

A. Well, if it is one vessel both lights. That is true of half a dozen vessels, unless the lights are obscured by other vessels.

(Objected to as to the last part of the answer as being in answer to a leading question, and incompetent.)

C. F. MOORE.

Subscribed and sworn to before me this 18th day of March, A. D. 1875.

JAMES J. KELSO,

Notary Public, Wayne County, Mich.

And the said JAMES P. COTTON testified as follows:

I live in the city of Detroit; my present business is keeping a wood-yard.

Q. What has it been for the last five years?

A. Sailing; been sailing as master of vessels for about 20 years
103 on these lakes. In 1872 I was sailing as master schooner William Sanderson. I know the barque American Union. I recollect seeing her, as I supposed, laying to an anchor under the north side of Beaver Island about the 9th of September, '72; it was at Sand Bay, as we called it. We reached there about 10 o'clock in the daytime and found this American Union laying at harbor.

We were laying there on account of heavy SW. wind. We remained about 20 hours. The American Union left in the evening of the same day, in the forepart of the evening. She wasn't there at 12 o'clock at night, but was there at dark; did not see her go. I turned in between 8 and 9 o'clock at night, and she was there at 8 o'clock, for I saw her anchor light at that time. I was called at 12 o'clock; she was gone then. I was up probably half an hour at 12 o'clock; got up and dressed myself and remained about that time, and then turned in again; was up again between 4 and 5 in the morning. We weighed anchor and left there about 8 o'clock.

Q. How was the wind as to force and direction when you turned in at eight o'clock in the evening?

A. The wind was southwest, the wind was lulling down then.

Q. How was the wind at 12 o'clock when you were up?

A. Wind was west-northwest what little there was of it.

Q. How was it when you got up in the morning?

A. There was not any at all, not that you could perceive.

Q. How was it when you weighed anchor and left?

A. Well, what little there was was about NW.—it may have been a little more to the northward.

Q. Where were you bound?

104 A. Green Bay.

Q. What was your heading to Green Bay?

A. West by south.

Q. How was the wind to you after you got under way?

A. The wind followed me right around the island. I got out clear of the Beaver about 2 o'clock in the afternoon. After I got round the island the wind was to northward.

Cross-examination:

Q. Did you look at the compass while you lay there at Sand Bay?

A. Yes, sir; looked at it a great many times. That is the way I ascertained how the wind was before I turned in, by looking at the compass. I looked at it at 12 o'clock when I got up.

Q. Does the needle vary there any?

A. Not that I know of.

Q. Had you any sail up while you lay there?

A. I had our mainsail up and no other.

Q. How long did you stay up when you got on deck?

A. I should think half an hour; it might have been longer, but not less than that.

Q. Are you sure it was September that you saw the Union there, and not August?

A. Well, I will not be sure, but I think it was September. It was the time I was there myself; may have been August. It was the only time I lay there ever.

Q. How was the wind after you passed Beaver Island to you?

A. The wind was free. I was sailing before the wind. On reflection, I wish to add that I think the time was August, not September.

Redirect:

Q. At what place on Green Bay were you bound, and at what point did you enter the bay?

A. Place called Little Sturgeon Bay, and I entered at Louse Island Passage; the other passages are called Death's Door and Poverty Passage.

Q. How long after that did you hear of the collision?

A. I can't tell how long, but heard of it when I got down next trip. I might have heard of it in Chicago, when I got up, but I am not sure. Mr. Winslow's folks in the fall, in December, as I was laid up in Buffalo, asked me if I knew anything about this collision, how the wind was, as I was laying there.

JAS. P. COTTON.

Subscribed and sworn to before me this 19th day of March, A. D. 1875.

SAMUEL J. KELSO,
Notary Public, Wayne Co., Mich.

In the district court of the United States for the northern district of Ohio.

WILLIAM G. WINSLOW AND HEZEKIAH J.	}	United States court.
Winslow		
<i>vs.</i>		
SCHOONER S. S. OSBORN.		

And cross-libel of—

BLISS O. WILCOX	}
<i>vs.</i>	
SCHOONER AMERICAN UNION, W. G. & H. J.	
Winslow.	

CLEVELAND, March 15, 1875.

106 SIRS: You are hereby notified that James P. Cotton, John Wilkinson, Thomas McLoovan, Christopher F. Moore, and Morris Barrett will be examined de bene esse before me, at my office, at No. 3, 1st floor, Moffat block, Detroit, on the 17th day of March, A. D. 1875, at 3 o'clock p. m. of said day, as such witness for the above-named libellants according to the act of Congress in such case made and pro-

vided at which time and place you are entitled by law to be present, and put interrogatories to said witnesses.

SAMUEL J. KELSO,
Notary Public, Wayne Co., Mich.

To PRENTISS and VARCE,
Att'ys for the above-named Respondents.

Received a copy of the above notice at 3 p. m. March 15th, 1875.
PRENTICE AND VARCE,
Att'ys for Def'ts.

DISTRICT OF MICHIGAN,
Wayne County, ss :

I, Samuel J. Kelso, notary public in and for the county of Wayne, State of Mich., do further certify that under and by virtue of the said several acts of Congress in such case made and provided, that the reason for taking the foregoing deposition is, and the fact is that the witnesses reside more than one hundred miles from the district
107 court of the United States for the northern district of Ohio, where said case is to be tried, and that the proctors for both libellants and respondents, reside in Cleveland, Ohio.

I further certify that due notice of the taking of said depositions was served on Messrs. Prentiss & Varce, attorneys for defendants, which said notice and acceptance of service thereof is hereto attached, that by consent of parties said time for taking depositions was postponed until the 18th March, 1875.

I further certify that on the 18th day of March, A. D. 1875, I was attended by William A. Moore, esq'r, solicitor on behalf of libellants, and by Loren Prentiss, esq., solicitor on behalf of defendants, also by Morris Barrett, Christopher F. Moore, and James P. Cotton, witnesses, who were of sound mind and lawful age, and the said witnesses were by me first severally, carefully examined and cautioned, and sworn to testify the whole truth, and nothing but the truth, and the deposition was by me reduced to writing in their presence, respectively, and after the same was carefully read, they, the witnesses aforesaid, subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of sealing it up, and directing it with my own hand to the court, for which the same was taken; and I do further certify that I am not of counsel nor attorney for either of the parties in deposition and caption named, nor in any way interested in the event of the cause named in said caption.

108 In testimony whereof I have hereunto set my hand and seal this twenty-second day of March, in the year one thousand eight hundred and seventy-five.

SAMUEL J. KELSO, [SEAL.]
Notary Public, Wayne County, Mich.

UNITED STATES OF AMERICA,
*Northern District of Ohio, City of Cleveland,
County of Cuyahoga, and State of Ohio :*

Be it remembered that on the 3rd day of May, A. D. 1875, I, L. M. Schwan, a commissioner duly appointed by the circuit court of the United States for the northern district of Ohio, in the sixth circuit, under and by virtue of the act of Congress entitled "An act for the more

convenient taking of affidavits, and in civil causes depending in the courts of the United States," passed February 20th, in 1812, and the act of Congress entitled "An addition' to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed Sept. 24th, 1789, did call and cause to be, and personally appear before me, at my office at 81 Public Sq'r, in the city of Cleveland, in the said northern district of Ohio, in the State aforesaid, Solon S. Rummage, E. M. Perkins to testify, and the truth to say on the part
109 and behalf of libellants in a certain suit or matter of controversy now pending and undetermined in the district court of the United States for the northern district of Ohio, wherein Wm. G. Winslow et al., ar' libellants, and the schooner S. S. Osborn, respondent.

And the SOLON S. RUMMAGE, being about the age of 55 years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid. I did thereupon depose, testify, and say as follows:

Q. 1. What is your name, age, and occupation, and how long have you been so occupied?

A. My name is Solon S. Rummage; age, 55; occupation a sailor. Have been sailing since 1833.

Q. 2. In what capacity have you sailed since then?

A. Seven or eight years before the mast, and seven or eight years I was mate. Have been sailing as master ever since 1847. Sailed schooners, propellers, tugs, and all kinds of vessels.

Q. 3. What vessel did you sail last year?

A. Last year I was on the steamer Persian as master. The year before that I was on the tug Admiral Porter, and in the year 1872 I was on the tug Cleanatio. Towed the American Union twice or three times that year.

Q. 4. Are you acquainted with the build of the American Union?

A. She is built very much as ordinary vessels of her size are. She tumbles in about the same as ordinary vessels of her size. I had towed her previous to the year 1872. During the year 1872 I towed her twice or three times.

110 Q. 5. Did you at any time during the year 1872 tow her in the night time?

A. The last time I towed her from here to Lake Huron was in the night time. This was in the latter part of the season of 1872. We left here one afternoon and arrived at Port Huron the next afternoon.

Q. 6. At this time where did the American Union carry her lights?

A. She carried them about one-third of the way forward from her stern; that is, just forward of the mizzen-rigging.

Q. 7. On this occasion how far was the tug forward of the American Union?

A. Between 200 and 250 feet.

Q. 8. At any time during the night upon this occasion was the tug dead-ahead of the schooner?

A. She was dead-ahead of her most of the time.

Q. 9. When in that position state how were the lights of the American Union, whether visible or not.

A. The tug being narrower than the schooner they could not be seen without a little variation. The Union is about ten feet wider than the tug. If the tug had been as wide as the vessel we could have seen both lights when dead-ahead of her.

Q. 10. Do you know the schooner Osborn?

A. I do.

Q. 11. With the schooner Osborn 200 feet dead-ahead of the American Union what difficulty, if any, would there be in seeing the Union's lights from the Osborn?

111 A. In walking the deck there would be no difficulty. An ordinary outlook would see both lights.

Q. 12. Suppose the Osborn to be approaching the Union from one to two points over the Union's port-bow, what difficulty, if any, would there be in the outlook of the Osborn seeing the port-light of the Union?

A. There would be no difficulty whatever.

Q. 13. In your opinion where is the proper place for a vessel of the size and build of the American Union to carry her signal-lights?

A. I should think they were in their proper place. I should not want to carry them anywhere else.

Q. 14. Where do vessels of her size and build usually carry their signal-lights?

A. The most of the vessels carry them on the quarter, where she did; a few carry them forward.

Q. 15. What do you say as to the propriety of carrying the lights forward?

A. I do not think it is the proper place, from the fact that both lights are apt to get mixed up. When the lights are forward you can vary a point and still see both lights, and you can't tell her course till you get very close. When the lights are aft on the quarter you cannot possibly make a mistake.

Cross-examination by Mr. VARCE:

Q. Where do you reside?

A. At Cleveland.

Q. What vessel do you sail this year?

A. I am building a tug here in Cleveland.

112 Q. Did you ever make any examination with the special view of determining in what manner and from what points and directions the American Union's lights could be seen?

A. No, sir; nothing special; nothing further than general observation.

Q. How wide is the American Union?

A. About 30 to 32 feet, I should say.

Q. About what is her length?

A. I can't tell exactly; from 140 to 160, I think. That is as near as I can get at it without measuring.

Q. How do you fix the date when you last towed her?

A. I don't fix the date any other way than that I know that it was in the latter part of the season. I am positive I towed her in 1872.

Q. What makes you positive of that year?

A. My books and tow-bills. That was the last year I was in the tug Clematus.

Q. Have you referred to your books and bills to ascertain the year?

A. I don't know that I have, but I remember the year very well. I could not state the month except by referring to the books.

Q. What kind of screens did she carry on that trip?

A. About 5 or 6 feet long. Two boards nailed together at right-angles, about 14 or 16 inches high. That is ordinary height. Could not say how they were fastened on rail. I was not on board of her nor astern of her.

Q. Was the American Union loaded or light on that trip?

113 A. She was light; I think she had on some cargo, but it was light.

Q. What kind of a night was it?

A. An ordinary calm night, dark, no moon; I don't remember about that; no wind; I was up a good deal of the night—more than half the night.

Q. Were you aboard the American Union?

A. Yes, sir; a great many times. I was aboard of her when they were building her.

Q. Were you ever aboard of the Osborn?

A. Yes, sir; I was aboard of her at the time she came in here after the collision. I went on board of her the next morning. I should say the Osborn was the largest vessel of the two. I suppose they are both built in pretty much the same manner. The models are different; the American Union is built sharper and draws more water both light and loaded than the Osborn.

Redirect by Mr. TERRELL:

Q. Were the screens of the Union the ordinary screens of vessels of her kind?

A. Yes, sir; the ordinary screens and the ordinary length.

S. S. RUMMAGE.

Subscribed and sworn to before me this 3rd day of May, 1875.

S. M. SCHWAN,

U. S. Commissioner.

114 EDWIN M. PERKINS, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says:

Q. 1. What is your name, age, residence, and occupation, and how long have you been so occupied?

A. My name is Edwin M. Perkins; age, 35 years; residence, Cleveland, and occupation a sailor. Have been sailing for 23 years. Sailed about eight years before the mast and about fifteen years as mate and master.

Q. 2. Do you know the schooner American Union?

A. Yes, sir.

Q. 3. How long have you known her?

A. About seven years.

Q. 4. Did you ever sail on her?

A. No, sir.

Q. 5. From the time you first knew her up to the close of the season of 1872, how frequently did you see her?

A. Probably 50 or 60 times; often sailed in company with her.

Q. 6. Where did she carry her lights?

A. She carried them on the quarter, anywhere from four to six feet forward of the mizzen rigging.

Q. 7. How did the model of the American Union compare as to tumbling in with that of ordinary vessels of her size?

A. Just about the same as in vessels that were built about the time she was built; very little difference, if any.

Q. 8. What is the usual place in vessels of her size for carrying
115 the signal-lights?

A. Eight out of ten carry them on the quarter; at least as many as that.

Q. 9. What, in your opinion, is the proper place for a vessel of her size to carry her signal-lights ?

A. On the quarter.

Q. 10. What do you say as to the propriety of carrying the signal-lights forward ?

A. Carrying them forward on the 'night-heads I consider very dangerous. They are so near together that you can vary a point from one side to the other and yet see both lights. This makes it impossible to tell the vessel's course; when carried on the quarter there can be no such trouble.

Q. 11. Do you know the schooner Osborn ?

A. Yes, sir.

Q. 12. What difficulty, if any, with the Osborn and American Union approaching one another end on would there be in seeing the lights of the American Union on the Osborn ?

A. I should think there would be no difficulty if the lamps were burning all right.

Q. 13. Suppose the Osborn were approaching the American Union from one point or more over the Union's port-bow, what difficulty would there be, if any, in seeing the port-light of the Union from the Osborn ?

A. I don't think there would be any difficulty at all.

Q. 14. Does or does not the Union tumble in enough to obscure the lights from a vessel like the Osborn, approaching her from dead ahead ?

A. I don't think she does.

Q. 15. How high above the decks were the lights of the Union ?

116 A. I think about four feet.

Q. 16. Would the fact that the approaching vessel was loaded and the Union light make any difference in respect to seeing her lights ?

A. No, sir; I think not.

Cross-examination by Mr. VARCE :

Q. Did you see the American Union on the trip during which she collided with the Osborn ?

A. Yes, sir; I did.

Q. Whereabouts ?

A. Here in Cleveland, when she was repairing after she got back here; I went aboard of her then.

Q. Did you ever make any examination of the American Union and of her lights, or of the place where they were carried, with the particular object of determining from what position they could be seen ?

A. No, sir; no special observation.

Q. Do you know how much she tumbles in ?

A. I do not. I know how she is with the average class of vessels at the time she was built, but I don't know how much to the inch.

Q. Did you ever examine her to ascertain whether she tumbles in more or less than the average vessels of her size ?

A. That I can't say, because they don't build vessels now the way they did then. Those built nowadays don't tumble in so much as those built eight or ten or twelve years ago. They then built them for speed, but now they build them for carrying a cargo.

117 Q. Did you ever make an examination to ascertain just how the American Union's lights were placed and screened ?

A. Yes, sir; I had occasion to notice at one time how that was. It was at the wood dock in St. Clair River.

Q. How were they placed there ?

A. The green light was then on the starboard quarter, about from four to six feet forward of the mizzen rigging, and was attached on the rail by a common screen. It was fastened on the monkey-rail; did not notice just how.

Q. What vessels do you sail?

A. I sailed the Yosemite last year; am not sailing her this year; am not sailing any, but have quit.

Q. Have you ever been dead ahead of the American Union when her lights were burning?

A. Yes, sir; this time that I have spoken of in the St. Clair River, she was astern of us. I was then on the Levi Rawson.

E. W. PERKINS.

Subscribed and sworn to before me this 3rd day of May, A. D. 1875.

L. M. SCHWAN,
U. S. Com'r.

UNITED STATES OF AMERICA,
Northern District of Ohio, ss :

I, L. M. Schwan, a commissioner duly appointed by the circuit court of the United States for the sixth circuit and northern district of Ohio under and by virtue of the act of Congress entitled "An act 118 for the more convenient taking of affidavits and bail in civil causes pending in the courts of the United States," passed February 20th, 1812; and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes pending in the courts of the United States;' passed March 1st 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, that the testimony of Solon S. Rummage E. M. Perkins is material and necessary in the cause the title whereof is in the caption of said deposition named and pending in the district court of the United States for the northern district of Ohio.

I further certify that no notification of the time and place of taking said deposition signed by me was made out and served on the respondents to be present at the taking of said depositions, and to put interrogatories if he, or they might think fit, but that the depositions above, were taken by consent of the parties.

I further certify, that on the 3rd day of May, in the year of our Lord one thousand eight hundred and seventy-five, I was attended by H. L. Terrell, for libellants, and C. M. Varse, for respondents, and by the witnesses aforesaid, who were of sound mind and of lawful age; and the witnesses were by me first carefully examined and cautioned, and 119 sworn to testify the truth, the whole truth, and nothing but the truth, and their depositions were by me reduced to writing in the presence of the witnesses aforesaid, and from their own statements, and after carefully reading the same to the witnesses, they subscribed the same in my presence.

I have retained the said depositions in my possession for the purpose of sealing up and directing the same with my own hand to the court for which the same were taken; and I certify that the same will be retained by me until I shall deposit the same, with my own hand sealed up and directed as aforesaid, in the post-office at Cleveland, Ohio, the place where the said depositions were taken; and I do further certify that I am not of counsel or attorney for either of the parties in the

said depositions and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof I have hereunto set my hand this 3rd day of May, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States of America the ninety-ninth.

L. M. SCHWAN,
U. S. Commissioner.

120 In the district court of the United States within and for the northern district of Ohio.

WILLIAM G. WINSLOW ET AL. }
vs. }
SCHOONER S. S. OSBORN. }

The respondent will take notice that on Thursday, the 1st day of March, A. D. 1877, the above-named libellants will take the depositions of W. P. Bryan, to be used as evidence on the trial of the above-entitled cause, at the office of George Hilton, in the city of South Haven, county of Van Buren and State of Michigan, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day between the same hours until they are completed.

WILLEY, TERRELL AND SHERMAN,
Attorneys for Libellants.

I acknowledge service of the above notice by copy, this 23rd day of February, 1877.

PRENTISS AND VARCE,
Attorneys for Respondents.

THE STATE OF MICHIGAN,
County of Van Buren :

Deposition of William P. Bryan, taken before me, O. N. Hilton, a notary public in and for Van Buren County, Michigan, on the 1st day of March, 1877, between the hours of eight o'clock a. m. and six o'clock p. m., at South Haven, in said county, pursuant to the annexed notice, to be read in evidence on behalf of the libellants in an action pending in the United States district court within and for the northern district of Ohio, wherein Wm. G. Winslow et al. are libellants, and the schooner S. S. Osborn is respondent. Present on behalf of libellants, L. M. Schwan, of Cleveland, Ohio, and on behalf of respondent.

Q. 1. What is your name, age, residence, and occupation ?

A. My name is William P. Bryan ; age, forty-nine years ; South Haven, Van Buren County, Michigan ; occupation, seaman.

Q. 2. Are you acquainted with Charles Q. Ingraham, formerly mate of the barque American Union ?

A. I am.

Q. 3. What, if anything, do you know in regard to a correspondence between Ingraham and one Bailey, of Toledo, a shipbuilder, in reference to the testimony of Charles O. Ingraham in the collision case now pending between the owners of the American Union and the schooner S. S. Osborn ?

A. In the winter of 1873 and 1874 Charles O. Ingraham came to my office and showed me a letter from Bailey, of Toledo, asking him what he knew of a collision between the American Union and the Osborn, and whether or not his testimony would be of service to them, requesting an answer; that he was the builder of the Osborn and took an interest in the welfare of her owners. Ingraham requested me to answer that letter, and word the letter so that he should not commit himself should he be called upon on the Winslow side again, but to
 122 give Bailey to understand that if his testimony was to be paid for it would be of service to the owners of the Osborn. I wrote such a letter for him and to it signed his name. At this same time he, Ingraham, told me that he had been already once called on the same suit by Winslow, but that they didn't pay him very well, and that, as he was hard up, he proposed to work for the parties that paid him the most.

In about three or four weeks he came to me with another letter, an answer to this last, asking him to state more fully what he knew of the matter and what he would charge them should they send for him. I answered that letter, also, as he dictated to me and at his request.

The substance of the letter was: "My testimony will be of service to you when I tell the truth, even though it injures those I was sailing for; and if called upon I shall have to tell those facts; and if you require my services I will go down for \$100, with \$50 to be paid in advance, and the balance, \$50, to be paid me on my arrival at Toledo, as I shall need it for the support of my family." He also said that he was hard up, and that his testimony would be of benefit to the owners of the Osborn if they paid him; and he also asked me if this was not right. I replied: "You are your own master."

About one month afterwards he got an answer to this letter, which he also brought to me, stating that his offer was accepted, and that the money would be forthcoming when his testimony was needed.
 123 He also said that if they complied with this promise he would go. He also brought me another in about two months, stating that the suit was postponed, and stating to what time, but that his offer was accepted and that his money should be forthcoming.

Q. 4. State, if you please, what, if anything, you know in regard to Ingraham's having received the whole or any part of the money above spoken of in these letters.

A. In November, 1875, Charles O. Ingraham's wife received draft from Bailey, of Toledo, of \$50, which she brought to me and asked for my assistance to help her negotiate it, as she wished to go to Paw Paw to effect the release of her husband from county jail; but we couldn't do so, as draft was payable to Ingraham's order; and after Ingraham was released from jail he informed me that he had obtained the money on it and left here to go to Toledo.

In the summer of 1876, about the last of October, he told me the suit was again postponed, but that they had taken his testimony there in Cleveland. I asked him how his testimony so given agreed with his former testimony, and if it did not conflict, so as to get him into trouble. He said no, as he had had his former testimony read to him before he gave in his last testimony on last occasion, and that his second testimony was the same as given before. He said the suit would come on this winter, and "I may want you to write some more letters for me. I have already got \$100 out of them, and I won't go when they want me unless they pay me more in the way of another hundred dollars."

124 Q. 5. Where were these letters that you speak of written?

A. In my office, in the village of South Haven, Michigan. I was justice of the peace for the time and had an office for the transaction of such business.

Q. 6. Where did the last conversation you speak of, in which he told you that he had received one hundred dollars from the Osborn folks and that he would not go unless he got another hundred dollars, take place?

A. It was on the street, on Main street, coming down town from his and my house. We both live in same neighborhood. He asked my opinion, and I gave him but little in the way of an answer. He always gave me to understand that he wished to make money out of it, and for me to so frame his letters as to avoid any criminal liability for him.

WILLIAM P. BRYAN.

STATE OF MICHIGAN,

County of Van Buren :

I, O. N. Hilton, a notary public in and for said county, do hereby certify that William P. Bryan was by me first duly sworn to testify the truth, the whole truth and nothing but the truth, and that the deposition by him subscribed as above set forth was reduced to writing by myself in the presence of the witness, and was subscribed by said witness in my presence, and was taken at the time and place in
125 the annexed notice specified. I further certify that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit.

In testimony whereof I hereunto set my hand and official seal this 3rd day of March, A. D. 1877.

[SEAL.]

ORRIN N. HILTON,

Notary Public in and for Van Buren County, Mich.

STATE OF MICHIGAN,

County of Van Buren, ss :

I, Henry S. Williams, clerk of said county of Van Buren, and of the circuit court therein, being a court of record having a seal, do hereby certify that Orrin N. Hilton, whose name is subscribed to the annexed affidavit and therein written, was, at the time of taking such affidavit, a notary public in and for said county, duly commissioned and qualified and duly authorized by law to take the same; and further, that I am well acquainted with the handwriting of such notary public and verily believe that the signature to the said affidavit is genuine, and as such entitled to full faith and credit.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office in the village of Paw Paw, in said county, this 2nd day of March, A. D. 1877.

[SEAL.]

HENRY S. WILLIAMS, *Clerk.*

126 UNITED STATES OF AMERICA,

Northern District of Ohio, City of Cleveland,

County of Cuyahoga and State of Ohio :

Be it remembered that on the thirteenth day of June, A. D. 1874, I, L. M. Schwan, a commissioner duly appointed by the circuit court of the United States for the northern district of Ohio, in the sixth circuit, under and by virtue of the act of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812; and

the act of Congress entitled "An act in addition to an act entitled 'Act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817; and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me at my office in the city of Cleveland, in the said northern district of Ohio, in the State aforesaid, Robert F. Parsons, to testify and the truth to say on the part and behalf of the libellants, in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the northern district of Ohio, wherein W. G. Winslow et al. are libellants and the schooner S. S. Osborn respondents.

And the said ROBERT F. PARSONS being about the age of 36 years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Robert F. Parsons, and he did thereupon depose, testify, and say as follows:

Q. 1. State your name, age, residence, and occupation.

A. My name is Robert F. Parsons; age, 36 years; Modoc City, Pa., residence; and am in the oil business.

Q. 2. State whether you have ever been a sailor; and, if so, for how long and in what capacities.

A. I have been a sailor; I sailed 18 years in all capacities but cook.

Q. 3. Have you been master; and, if so, for how long?

A. I have been master for ten years, from 1862 to 1873.

Q. 4. When did you stop sailing?

A. In October, 1872.

Q. 4. On what vessel were you sailing in August, 1872, and in what capacity?

A. The schooner American Union, as captain.

Q. 5. Do you remember the occasion of the collision off Beaver Islands of the American Union and the schooner Osborn?

A. Yes, sir.

Q. 6. State fully on what voyage the American Union was bound, and all the circumstances of the collision.

A. The American Union left Cleveland on that trip Monday, August 5, 1872, bound for Escanaba light; Friday, Aug. 9, encountered at noon a heavy wind from the southwest, and having reached Sand Bay, Beaver Island, east side, and went to an anchor, wind shifted from SW. to NNW. at half past 9 o'clock p. m. of same day, with squall and rain; hove up anchor and left for Escan'ba abreast of Beaver Island light-house at 11½ o'clock p. m. same night; hauled the Union at this time by the wind, her sheets flat aft; I told the man at the wheel to keep her full and by, which was done; she would head due west close to the wind on the starboard tack; when we opened up the island and put her by the wind the wind was NW. by N. and the vessel would sail within five points of the wind; at 12 o'clock, midnight, not feeling well, I asked my first mate to stop on deck for me an hour; it was the second mate's watch; I went below at 12 o'clock, midnight, leaving both mates on deck; I laid down with boots and clothes all on, and had been lying down about ten minutes, not having been asleep, when the first mate came to my door and called me on deck; said there was a vessel steering for us; I immediately went on deck; I looked as he pointed under our main boom, and saw a green light about two points on our lee or port bow; I could not luff up, as we were jam on the wind, and could not keep off, because I would have to run across

the other vessel's course, crossing her bows; I therefore kept her steady on the wind; I saw the approaching vessel very near to us, and I sent my mate forward to sing out to her to keep away; he immediately did so; I stood aft watching the movements of the other vessel, expecting to see her keep away; a few seconds before she struck I noticed the Osborn luff up across our bows; this was immediately after the mate sung out; the mate sung out "keep away;" the Osborn struck us
 129 in the lee or port bow, from 15 to 20 feet from our *our* stem, crushing in the frame, planks, &c. It tore away the Osborn's head gear and took foremast out of her, &c. We lapped alongside, our stern to his head, port sides together; we lashed the vessels together. The Osborn took in all her canvas, and the Union kept her foresail, mainsail, and two jibs set. Shortly after the collision we took in our mizzen and a jib. In this way we drifted to the leeward of the Foxes, and our canvas caused our vessel to headreach, so that we were lying in the troughs of the sea drifting and headreaching at the same time. After the vessels were made fast together, just after the collision, our wheel was lashed hard down or aport, and left in that position during the balance of the night. While we were drifting and headreaching during the night our vessel was heading due SW., as I looked at the compass frequently during the night, having the vessels in my charge. Immediately after the collision I sung out to know what vessel it was, and I got no answer. I again sung out, and shortly after got a reply that it was the Osborn. I then called the captain by name, as I know him. I told him he better get aboard the Union. He replied, "Christ, I have got a cabin full of women." We went to work and got them aboard the Union.

Q. 7. From 11 $\frac{1}{4}$ o'clock p. m. that night till the collision where was the wind, and what changes were there, if any, in it?

130 A. There was no change in the wind during the time mentioned; it was NW. by N.

Q. 8. During the same time, what change, if any, was there in the course of the American Union?

A. No change; steady by the wind all the time.

Q. 9. During the same time, where were your lights placed, and in what condition were they?

A. Placed forward of the mizzen rigging in the screens on the main rail, outside the monkey-rail.

Q. 10. In your opinion, was or was not this a proper place for them?

A. In my opinion it was; in that position they could be seen dead ahead.

Q. 11. In the position in which the lights were, how far and in what direction could they be seen?

A. They could be seen from dead ahead to two points abaft the beam, and in good night for seeing lights they could be seen six miles. They were just as good lights as could be manufactured.

Q. 12. In answer to question 9 you omitted to state in what condition your lights were at the time of the collision. Please state now.

A. They were burning good. I looked at them when I came on deck.

Q. 13. How long after you came on deck did the collision occur?

A. From three to five minutes.

Q. 14. What canvas did you have set at the time of and for an hour prior to the collision?

A. Had foresail, mainsail, mizzensail, and three jibs set.

Q. 15. When was the mizzen and the jib taken in?

131 A. Within two minutes after the collision. The first order I gave after the collision was to lower away the mizzen.

Q. 16. At time of the collision, what kind of night was it for seeing lights?

A. It was good, and had been for half an hour or more.

Q. 17. How far could a vessel's sails be seen at the time of and for half an hour before the collision?

A. From a mile to a mile and a half. I saw the canvas of the Osborn shortly after I came on deck.

Q. 18. Did you hear anything said by any of the crew of the Osborn at the time they got aboard the Union; if so, what was it?

A. Yes, sir. I heard the fellow that got up in our mizzen rigging say that the collision all came from their not having any lookout.

Q. 19. Do you know the age young Seamen, mate of the Osborn?

A. I only know what Captain Seamen told me.

Q. 20. What did he tell you? State fully.

A. He told me at the time of the collision that his son was 19 years old, and that he was sorry the collision occurred in his watch. He said his son had sailed three years. He said he had had a good mate two trips previous to this, and that he couldn't get another mate, so he took his son as mate.

Q. 21. How do you account for the Osborn's main boom falling across her cabin?

A. When she came under the lee of our sails his boom swung amidships, and when her foremast was carried away her stays slackened up and her mainmast sprung aft, letting her boom down; or, he had
132 made so much leeway in coming across that he had been compelled to haul up to the wind. Either explanation would account for it if it be true. I should judge by the way she was heading that the latter explanation is the true one, as she was heading away above her course.

Q. 22. How was the Osborn heading?

A. I should judge she was heading about NE.

Q. 23. What is the course by chart across from Beaver Island to Poverty Passage?

A. W. $\frac{1}{2}$ S.

Q. 24. How much, if any, faster will a loaded vessel sail with a free wind than close-hauled?

A. Generally about a third.

Q. 25. Is it a common or uncommon thing for a vessel coming across from Poverty Passage to the Beaver, with wind and sea anywhere from the northward, to make leeway?

A. It is a quite common thing.

Q. 26. If a vessel in coming across there should make Fox light on the night of the collision, what would that indicate in reference to her having made leeway?

A. It would indicate that.

Q. 27. There are witnesses testifying to a conversation which they say occurred between Captain Seamen and you after the collision, on the deck of the Osborn, in respect to the north star and their perm'ant, &c. State just what that conversation was.

A. Capt. Seamen and I differed. He referred to the compass.
133 The vessel (Seamen's) was heading to northeast. The wind was blowing right abeam, or very nearly so, and our fly was blowing right across his decks. The conversation between us was in regard to the wind. He said, pointing to the north star, "There is a fellow that

don't lie," and claiming that the wind was blowing from about the direction of that star. I did not contradict him.

Q. 28. What is the bearing by compass of the north star from the place where you then were?

A. NNW.

Q. 29. What conversation occurred between you and Capt. Seamens in respect to your lights?

A. I called his attention to my lights and asked him if they were not good lights and burning good, and he replied that they were.

Q. 30. Did Captain Seamens, at any time, show you the way his sheets lay, and say that you could see that they were close aft and as sharp on the wind as they could be and keep his course; and you reply that you saw his green light some time before you struck him, but could not see any other light?

A. No, sir; I remember no such conversation in regard to the sheets. The next day after the collision we had a conversation in respect to his main boom, and he said that was where his boom dropped. That was all that was said.

Adjourned till 2 o'clock p. m.

Q. 31. Have you given all the conversations that have taken place between you and Captain Seamens in respect to the collision?

134 A. No, sir; I had one other conversation with him the *the* day after the collision, while we were towing. He said Wilcox had already lost \$14,000.00 by the wreck of the Osborn on Lake Erie several years before, and that it would come hard on him to pay for this damage. These are the only conversations that I had with Capt. Seamens about the collision. Seamens did most of the talking. I talked very little.

R. F. PARSONS.

No cross-examination.—COMMISSIONER.

UNITED STATES OF AMERICA,

Northern District of Ohio, ss :

I, L. Manuel Schwan, a commissioner duly appointed by the circuit court of the United States for the sixth circuit and northern district of Ohio, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes pending in the courts of the United States," passed February 20th, 1812; and the act of Congress entitled "An act in addition to an act entitled an act for the more convenient taking of affidavits and bail in civil causes pending in the courts of the United States," passed March 1st, 1817; and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, that the testimony of Robert F. Parsons is material and necessary in the cause the title whereof is in the caption of said deposition named
135 and pending in the district court of the United States for the northern district of Ohio.

I further certify that the above deposition was taken by the consent of parties hereto. I further certify that on the thirteenth day of June, in the year of our Lord one thousand eight hundred and seventy-four, I was attended by H. L. Terrell, esq., for libellants and by the witness aforesaid, who was of sound mind and lawful age; and the witness was by me first carefully examined and cautioned and sworn to testify the

truth, the whole truth, and nothing but the truth, and his deposition by me reduced to writing in the presence of the witness aforesaid and from his own statements, and after carefully reading the same to the witness he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of sealing up and directing the same with my own hand to the court for which the same was taken; and I certify that the same will be retained by me until I shall deposit the same with my own hand, sealed up and directed as aforesaid, in the post-office at Cleveland, Ohio, the place where the said deposition was taken; and I do further certify that I am not of council or attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof I have hereunto set my hand this 15th day of June, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States of
136 America the ninety-eight.

L. M. SCHWAN,

U. S. Commissioner, duly appointed by the Circuit Court of the United States for the Sixth Circuit and Northern District of Ohio.

United States district court, northern district of Ohio, in admiralty.

WILLIAM G. WINSLOW ET AL.)
vs.
THE SCHOONER S. S. OSBORN.)

Depositions taken by consent in above case at the office of Prentice and Varce and at the time hereinafter certified to.

Henry L. Terrell present on behalf of libellants.
Prentiss & Varce " " " " respondents.

PETER LEIB, of lawful age, being by me first duly sworn, deposes and says:

Q. 1. State your name, age, occupation, and place of residence.

A. My name is Peter Leib; age, 29 years; am a sailor; have no settled place of residence; have been sailing 13 years; have sailed before the mast and as 2nd mate.

Q. 2. Where and in what capacity were you employed during the month of August last?

A. I was employed on the schooner Osborn by Captain Seamens; was before the mast.

137 Q. 3. Where was the schooner Osborn and on what voyage, on or about the 9th day of August last, at the time of the collision with the schooner American Union?

A. She was on the passage from Escanaba to Erie. We had Beaver light in sight from about 11 o'clock to the time of the collision. We were steering east by north half north, and had the light about a point on our weather bow. I can't tell exactly how far we were from the light. We had sailed about $\frac{3}{4}$ of an hour after we saw the light before the collision.

Q. 4. What was the direction of the wind from 8 o'clock that night to the time of the collision, and what tacks had you aboard during that time?

A. The wind was to the eastward of north, steady. We had port tacks aboard.

Q. 5. What part of the time from eight o'clock to the time of the collision were you on deck, and what were you doing?

A. The first two hours (from eight to ten o'clock) I was forward keeping lookout, and from ten to twelve I was at the wheel. I was not on the gallant forecastle, but on the main deck from 8 to 10.

Q. 6. What passage did the Osborn go through in coming from Green Bay, and what was the course of the vessel from the passage to the time of the collision?

A. I am not sure, but I think it was Rock Island. I am not acquainted with the passage. I was not at the wheel at that time and cannot tell. She headed east by north half north while I was at the wheel; her sheets flat aft; all hands were called up to haul aft the sheets at about seven o'clock. The sheets were flat aft up to the time of the collision, and the wind steady. We were sailing by the wind.

Q. 7. What lights had you aboard and what condition were they in?

A. We had a red and a green one. We had the green light on the starboard bow, and the red one on the port. They were in good condition.

Q. 8. Who were on deck from eight to ten o'clock that evening on the Osborn, and what was the duty and position of each one on deck?

A. Peter Bondy was on the gallant forecastle keeping lookout. Jim, whose surname I don't remember, and myself were on the deck, and also the mate. Jim was at the wheel at that time. I was mistaken in saying that Jim was on deck.

Q. 9. Who were on deck and in what positions from 10 o'clock to the time of the collision?

A. I was at the wheel from 10 to 12. Peter Bondy was on the lookout. Jim and the mate were on deck. The captain was on deck from eight o'clock to the time we made the Beaver light; when we made the light we went below. The capt. first saw Beaver light.

Q. 10. What was the character of the night?

A. It was dark and cloudy from a little after 7 o'clock to about half past 12.

Q. 11. At what time did the collision occur?

A. I don't know exactly what time; it was close on to 12 o'clock.

Q. 12. Had the 8 o'clock watch been changed at the time of the collision?

A. The new watch had not yet been called.

139 Q. 13. Who first saw the American Union just before the collision, and how near was she to your vessel before you saw her?

A. I didn't see her until her jib-boom pointed across our bow. I don't know who saw her first. I was the mate or one of the men forward. The mate was singing out "hard up," and he'd hardly got the words out of his mouth before he sung out "hard down."

Q. 14. What light, if any, did you see on the American Union prior to the collision?

A. I didn't see no light.

Q. 15. What lights, if any, had the American Union forward?

A. She had no lights forward; they were somewhere about the mizzen rigging.

Q. 16. Suppose the American Union had carried lights on her 'night-heads forward, the same as the Osborn, how far could you have seen

them from the position occupied by you at the wheel, had she approached head on or substantially so?

A. Yes, sir; I could have seen them then and for 20 minutes or half an hour before she could come into us.

Q. 17. Please state the bearings of the vessels to each other at the time of the collision, and all that you know in reference to the collision which you have not already stated.

A. She struck us on our starboard bow. She was going right across our bow. She took our bowsprit away. She took the whole lot away; our jib-boom; damaged our bow and forecastle; our anchor went overboard with about seven or eight fathoms of chain; the windlass
140 was rolled over against our scuttle-door, so the watch couldn't get out; took the forecastle out of her; square sail-yard broke; stays and ropes gone to pieces; the mainmast settled aft, letting the boom, so soon as the foremast fell, lay over on the cabin, and it laid there till this morning. It was about two feet towards midships from the corner of the cabin; the mizzen boom fell and landed on the skylight close to the wheel, about a foot from midships; the sheets were chock off the blocks. The sheets of the main and mizzen boom remained the same as before the collision, but in falling they would be a little further out.

Q. 18. After the collision did the bowsprit and jib-boom of the American Union rest over the deck of Osborn; and, if so, on what part of the deck, and what was the bearing of the jib-boom of the Union in reference to the sides of the Osborn?

A. Her jib-boom and bowsprit passed across the bowsprit of the Osborn just before the collision. At the time her jib-boom was pointing across our bowsprit she had a good headway on, and the American Union's anchor was catching on our stay, and that made her turn on our side; after the collision she lay on our port side. I was not forward at the time.

Q. 19. What damage, if any, was done to the port bow of the Osborn?

A. It took a rail out, some of the bulwarks, bow, and cat-head.

Q. 20. What became of the vessels after the collision?

141 A. They were alongside of each other; we tied them together; put the ladies on board the American Union. They drifted before the wind. I saw a little propeller at the dock at South Fox Island. We were about four miles off when we were nearest to her.

Q. 21. What schooner, or vessel, if any, did you see pass you immediately after the collision?

A. It was not right after the collision, about an hour after; she was so close that we could see her lights but not her sails; she was going up.

Adjourned to Sept. 21, at 10 o'clock a. m.

Sept. 21, met pursuant to adjournment.

Q. 22. What was the comparative injury of the port bow of the Osborn as compared with the injury to the starboard bow?

A. The port bow was injured the most. I don't know exactly how the vessels got into each other, because I could not see that plainly from the wheel.

Q. 23. Did you hear a conversation between Captain Seamens and Captain Parsons, immediately after the collision, in reference to the direction of the wind? And, if so, please state where they was standing at that time and what the conversation was.

A. Yes, sir; our captain called the captain of the American Union aft and showed him the compass and the fly, and showed him how the

wind was. He said "Look at the fly and look at the compass, and that will tell you how the wind is." Captain Parsons made no reply.

Q. 24. What, if anything, did Captain Seamens say in reference to the direction in which the wind was?

A. I didn't hear anything about it.

142 Cross-examination:

Q. 25. What time did you get through Rock Island passage that night?

A. I don't know exactly what time it was; about 5 to 6 o'clock.

Q. 26. Whereabout did the collision occur?

A. I don't know exactly how far we were from Beaver light; we had it in sight; we saw that all the time.

Q. 27. Did you say that you hauled your sheets flat aft at about seven o'clock?

A. Yes, sir.

Q. 28. Were they flat aft from that time until the time of the collision?

A. Yes, sir; we never touched them after we hauled them flat aft.

Q. 29. Where did you say the wind was from 7 till 12?

A. From 8 to 12 our watch was on deck, and it was eastward of north, steady.

Q. 30. How much to the eastward of north?

A. Towards a point north by east, something like that.

Q. 31. Did you say that you were at the wheel from 10 o'clock to the time of the collision?

A. Yes, sir.

Q. 32. During that time you say you were steering a course east by north half north?

A. No, sir; from ten o'clock till the time we made Beaver light we were steering east by north, and from that time on till the collision east by north half north.

Q. 33. Were you, at any time, sailing by the wind?

143 A. Yes; we were sailing by the wind, good full sail. I don't know how long we were sailing by the wind, but think from 8 to 12 o'clock.

Q. 34. Do vessels steer a course when they are sailing by the wind?

A. Yes; we were steering a course; sometimes they do; sometimes steer a course with sheets flat aft.

Q. 35. When you went to the wheel at 10 o'clock were your orders to keep her by the wind or to steer her on a course east by north?

A. East by north, I got.

Q. 36. When you changed her course at the time you made the Beaver Island light, were your orders then to keep her by the wind, or to give her a course east by north half north?

A. The captain he said, "Let her come up to east by north half north, and I think she will lay that."

Q. 37. How close to the wind will the Osborn lay?

A. I suppose she will lay about five points.

Q. 38. What is the course by compass from Rock Island passage past Beaver Island for a vessel sailing down?

A. That is more than I can tell. I ain't no pilot on those waters.

Q. 39. Can a vessel sail with her sails flat aft and at the same time have the wind two points or 3 points abaft the beam?

A. I never see it that way; that is more than I can tell.

Q. 40. Who was in charge of the watch from 8 to 12?

A. The mate, William Seamens, son of the captain.

Q. 41. How much of a breeze from 8 o'clock on till the time of the collision?

A. We had a good breeze.

Q. 42. You say you were at the wheel at the time of the collision?

144 A. Yes, sir.

Q. 43. Where was the mate at the time of the collision?

A. I was at the wheel and could not see where the mate was, but a little before the collision he was singing out to me.

Q. 44. Did you see him when he sung out to you?

A. No; but I heard his voice from the main deck.

Q. 45. Where was the lookout at the time of the collision?

A. I can't say anything about the lookout, I was at the wheel, you must ask the man himself about that.

Q. 46. Was he at his post on the forecastle?

A. I was at the wheel.

Q. 47. Was he not aft by the cabin, or in the cabin?

A. No; but after she struck us he came running aft.

Q. 48. Who did you say first saw the American Union?

A. I can't tell exactly who saw her first, but the mate sung out to me to put my helm hard up.

Q. 49. Did you not say, in your examination-in-chief, that you could not tell whether it was the mate or the man that saw her first and sung out to you?

A. I must have said it.

Q. 50. Did you hear any one on board the American Union hail your vessel just before the collision?

A. No; I didn't hear nothing.

Q. 51. How was the Osborn heading at the time the vessels struck?

A. She was heading east by north half north.

Q. 52. At what angle did the American Union cross her bows?

A. I couldn't see it plain from aft.

Q. 53. You say that you saw the bowsprit and jib boom of the
145 American Union cross your jib boom just before the vessels struck.
At what angle did the jib booms cross?

A. That's a thing I can't say for certain. I couldn't see plainly from the wheel, except to see her jib-boom point across ours.

Q. 54. Did you not say in your examination-in-chief that the American Union bore right across your bows?

A. I said the way that I could see from the wheel she went across our bows.

Q. 55. Did you see the lights of the American Union after the collision?

A. Yes, sir; when she was alongside of us. I noticed it about 15 minutes after she came alongside of us. It was her red light.

Q. 56. Was it a good light?

A. No, sir. It wasn't a particle as good light as that we got on our ship.

Q. 57. If it had been placed in a proper position it might have been seen a few rods, I suppose?

A. I don't know how far I could see them. I could hardly see them from our poop.

Q. 58. What injury was done to your starboard bow?

A. I can't recollect.

Q. 59. Since your examination yesterday have you had any conversation with Captain Seamens or Mr. Prentiss as to how the vessels came together, or as to which of your bows was injured most?

A. No, sir; not with Captain Seamens. But I did with Mr. Prentiss.

He asked me which bow was damaged the most, and I said the port bow. That was all he asked me.

Q. 60. Did you climb up into the mizzen rigging of the American Union just after the collision?

146 A. No, sir.

Q. 61. How much of a sea was there on the night of the collision?

A. There was quite a little sea on; a kind of swell.

Q. 62. Which way was it making?

A. That's a thing I can't tell. I never noticed it.

Q. 63. Was it a beam sea?

A. I never noticed the sea. From the time I was walking forward once and awhile there came a little spray forward.

Q. 64. When you brought your vessel up east by north half north was she as close to the wind as she could lie?

A. I suppose she would lay about half a point higher.

Q. 65. Who was at the wheel from 8 to 10?

A. A man by the name of Jim.

Q. 66. You say that after the collision Captain Seamens took Captain Parsons aft and showed the compass and fly. Where were you at the time?

A. I was aft on the poop at the time.

Q. 67. How long was this after the collision?

A. About 10 or 15 minutes after.

Q. 68. Have you not already sworn that for 15 minutes after the collision you were at the pumps?

A. Well, we were at the pumps every five minutes trying it. That's more than I know.

Q. 69. Did Captain Seamens and Captain Parsons go into the cabin when they went aft, as stated?

A. I was aft at the time; I don't know.

Q. 70. Where was the compass?

A. There was one in the binnacle, and there was one down on the table.

Q. 71. Which compass did the captains go to?

147 A. The one in the binnacle.

Q. 72. Did the captains both go up and look at the compass in the binnacle?

A. Yes, sir; both went aft. They both looked at it.

Q. 73. Who else was aft at the time?

A. All I know is I worked aft of the boat's tackle-falls.

Q. 74. Were you facing the binnacle?

A. No; I wasn't facing the binnacle, but I heard the conversation.

Q. 75. Then you didn't see the captains, but merely heard the conversation?

A. Yes, sir; I seen both of them standing there.

Q. 76. When did you see them, before or after the conversation, standing there?

A. I see at the same time they had the conversation.

Q. 77. Did you leave your work to turn round and look at them?

A. I looked at them at the time they commenced their conversation, and then went at my work.

Q. 78. Where were they standing at the time you looked at them?

A. Before the binnacle, looking at the compass in the binnacle.

Q. 79. Did you turn around and look at them after that?

A. No, sir. I walked forward; walked down on the main deck again.

Q. 80. How, then, do you know that Captain Seamans showed Captain Parsons the fly?

A. He showed that to him before I walked away from there.

Q. 81. Was there a light in her binnacle at that time?

148 A. That's what I didn't notice. I didn't notice that there was a light in the binnacle.

Q. 82. Don't you know that the light had been taken out of the binnacle at that time?

A. No; I don't know. We had no use for that light on deck. We couldn't use it for nothing.

Q. 83. Didn't the women have it in the cabin?

A. I don't know anything about that light.

Q. 84. If it had been in the binnacle at the time you saw the captain standing there, could you not have seen it?

A. I could see it if I had just thought about the lights.

Q. 85. What vessel were you on before you were on the Osborn?

A. I was on the William O. Brown, owned in Chicago by Dolgle.

Q. 86. Where did you winter last winter?

A. I went down to Philadelphia, and made a trip out to the West Indias.

Redirect:

Q. 87. Did you hear any conversation between the captains as to the drifting of the vessels after the collision; and, if so, what was it?

A. No, sir.

PETER LIEB.

Adjourned till Monday, September 23rd, at 10 a. m. Cleveland, September 21st, 1872.

Met Monday, September 23rd, 1872, at 10 a. m., and adjourned till 2 p. m. same day.

H. L. Terrell appearing for libellants.

L. Prentiss " " respondents.

149 JAMES O'NEILL, being first by me duly sworn, deposeth and saith as follows:

Q. 1. State your name, age, occupation, and place of residence.

A. My name is James O'Neill; age, about 25 or 26 years; occupation, sailor. I live here in Cleveland now. I was employed on the schooner S. S. Osborn during the month of August last; was before the mast.

Q. 2. Were you on the Osborn at the time of the collision with the American Union? If so, please state what you know in reference to the collision.

A. I was on the Osborn at the time of the collision. The first time I see the American Union she was right ahead, close to. I was standing at the pump then. I see she was that close that I could see there was no way of clearing her, but it was safer for me to run aft. I did not get way aft before they struck. I commenced to lower the boat down. When I came midships again she was alongside. We had to get the women and their trunks aboard the American Union. We went forward from there to get the men out of the forecabin. She struck the port bow. Both port bows came together. The Union was right head, coming right straight on. The foremast of the Osborn fell aft;

the fore boom fell on deck; the main boom fell on the cabin. The fore boom fell midships on deck, between the rail and the timberhead that was holding it, about half way. The main boom fell as far to leeward as it could get for the sheet. I couldn't say how far from the rail, but about six feet from the starboard side of the cabin. The fore boom also went off as far as the sheets would let it. The fore boom and the main boom remained fastened as they were from about half-past seven till the time of the collision.

Q. 3. About how far were you from Beaver Island light at the time of the collision, and in what direction was the light from your vessel?

A. I don't know, sir; I am not much acquainted about there. I couldn't say exactly how long we had the light in sight at the time of the collision.

Q. 4. How much of the time were you on deck that night, and how was your vessel sailing from 8 o'clock up to the time of the collision with reference to the wind?

A. I was on deck all night, from 8 o'clock. From 8 to 10 I was steering east by north. I was at the wheel during that time. I gave that course to the man that relieved me. We were sailing by the wind; sails good full going along our course. That is all I know about it, sir. I left the wheel at 10 o'clock.

Q. 5. What tacks had you aboard from 8 o'clock to the time of the collision?

A. Port tacks.

Q. 6. How were your sheets from 8 o'clock to the time of the collision?

A. The sheets were flat aft. The sheets were hauled flat aft sometime during the dog-watch, between 6 and 8. I saw no change in the sheets from that time on till the collision. I was on deck all the while, and could have seen if there had been any change.

Q. 7. Did the vessel continue to sail by the wind from the time the sheets were hauled flat aft till the time of the collision?

151 A. She was going along her course by the wind up to the time of the collision.

Q. 8. What was the direction of the wind that night from 8 o'clock to the time of the collision?

A. North by east.

Q. 9. What were you doing from 10 o'clock on to the time of the collision?

A. I travelled about the deck pretty much all the time.

Q. 10. What were you doing—which way were you facing just before the collision?

A. Just before the collision I was standing at the pump. I was facing aft.

Q. 11. Where was the mate at that time?

A. He was on the port side of the pump-handle. He was facing forward.

Q. 12. Who first gave the alarm or spoke the approaching of the American Union?

A. I don't know. I guess it was the master's voice I heard first—I guess it was. I ain't sure.

Q. 13. Who else, if any, was at the pumps just before the collision?

A. Peter Bondy. I don't know which way he was facing, I am sure.

Q. 14. How long was he at the pump before the collision?

A. I could not say how long. I guess about three or four minutes.

Q. 15. What lights, if any, did you see on the American Union just before the collision?

A. I saw none.

Q. 16. If the American Union had had her lights upon her bow the same as on the Osborn, how far could you have seen them that night, supposing she had been approaching you dead ahead or nearly so?

152 A. I don't know exactly how far; we could have seen them 15 minutes before we came aft to the pumps.

Q. 17. How long have you sailed, and in what capacity; and how fast was your vessel going that night?

A. I have sailed 8 years; six years before the mast, one year as boy, and one year as ordinary seaman. I don't know how fast the vessel was going that night.

Q. 18. How long did the vessels remain lashed together after the collision, and how near did they go to a propeller lying at the dock at the southerly end of Fox Island?

A. I don't know how long the vessels remained lashed together. I could not say how near to the propeller we went; but, as near as I can guess, about 3 or 4 miles. They remained lashed together till some time next morning.

Cross-examination:

Q. 19. What time did the Osborn get through the Rock Island passage that evening?

A. I don't know what time she did. I don't know what passage she did go through.

Q. 20. Did you say that the course given to you when you went to the wheel was east by north?

A. Yes, sir.

Q. 21. Did the wind continue steady in the same direction from 8 to 12?

A. Yes, sir; as near as I can go.

Q. 22. Could the Osborn, between 8 and 10, lay any closer to the wind than she did?

153 A. I guess she could about half a point or a $\frac{1}{4}$ — $\frac{1}{2}$ a point I'll say; but the gaff-topsail would lift at that.

Q. 23. What time did the collision occur?

A. By our time, about 10 minutes to 12; don't know exactly.

Q. 24. Was the American Union crossing your course from your lee side at the time of the collision?

A. When I seen her she was right ahead, a little on the lee bow, not much.

Q. 25. Do you mean to say that the vessels approached each other stem on?

A. Well, pretty near, I guess; I can't say exactly.

Q. 26. Was your starboard bow injured any?

A. Yes, it was. It was torn out a little; the bowsprit was torn out a little.

Q. 27. Did you say you were walking around decks most of the time from 10 to the collision?

A. Yes, pretty much all the time.

Q. 28. Where were you the balance of the time?

A. I was once down in the forecabin lighting my pipe; I was not in the cabin.

Q. 29. Whereabouts on ship was your pump?

A. Aft the mainmast.

Q. 30. When you and the mate were standing there just before the collision, which was the further forward, you or he?

A. Both alike. I was standing right opposite him; the pump was between us.

Q. 31. How far apart were you?

A. Couldn't say exactly. It might be 4 or 5 feet.

Q. 32. How far aft the mainmast is the pump?

A. I can't say; about 25 feet, I guess.

Q. 33. How long is your main boom?

A. In the neighborhood of 80 feet.

Q. 34. What is the distance between the foremast and the mainmast?

154 A. A little over 60 feet.

Q. 35. How far from her stern to her foremast?

A. I don't know; about 20 feet, I should think.

Q. 36. Whereabouts, with reference to you and the mate, did Peter Bondy stand?

A. He was standing on the weather side of the pump.

Q. 37. What was Bondy's post from 10 to the time of the collision?

A. Lookout.

Q. 38. What were you doing at the pumps just before the collision?

A. Pumping her out the best way we could.

Q. 39. Who was manning the breaks?

A. I and the mate.

Q. 40. How long had you been there at the pump before the collision?

A. Between 3 or 4 minutes, I guess.

Q. 41. Who was on deck at the time of the collision besides the mate, lookout man at the wheel, and yourself?

A. That was all.

Q. 42. What was the lookout doing aft by the pumps?

A. He just come there to give us a hand.

Q. 43. Which side of the pump was the mate, did you say?

A. The port side.

Q. 44. Did you climb up into the mizzen rigging of the American Union shortly after the collision?

A. No, sir.

Q. 45. Did you see any of your men climb up there?

A. No, sir.

Q. 46. After the collision, while the vessels were alongside, did you see how the sails of the American Union were trimmed?

155 A. Took no notice, only I saw the mizzen lowered down. I do not mean to say I saw it when it was being lowered down, but after it was lowered I saw a reef in her mainsail, too.

Q. 47. If you noticed the mainsail closely enough to know that there was a reef in it, why can't you tell whether it was hauled aft or not?

A. Because I took no notice of the trimming of the sails at all. When I see a reef in a sail I know it.

Q. 48. The port sides of the vessels lay together, did they not?

A. They were.

Q. 49. Did the booms of the American Union extend out over your rail and deck?

A. I took no notice.

Q. 50. Did you discover that the Union's mainsail had a reef in it while you were on your own deck?

A. Yes, sir; I wasn't aboard of her.

Q. 51. Do you say that the American Union's mizzen was lowered before you got the women aboard of her?

A. I don't know; I took no notice.

Q. 52. Did you see the lights of the American Union after the collision?

A. Yes, sir; I saw a red light. It was a small-looking light to me. I guess it was smaller than the Osborn's.

Q. 53. Where have you been since the Osborn came here for repairs?

A. I have been in Cleveland here. I've been living aboard-ship since.

Q. 54. Do you swear that on the night of the collision when you came on deck at 8 o'clock the sails of the Osborn were hauled flat aft?

A. Yes, sir; they were flat aft before I came on deck.

Q. 55. How much of a breeze was there that night?

156 A. It was a nice breeze.

Q. 56. Which way was the sea making that night?

A. We had a head sea; there might have been a stern sea at the same time, but I don't know anything about it. I know that the sea was coming over forward and wetting me, and that's all I know about it.

Redirect:

Q. 57. What kind of a night was it from eight till after the collision?

A. It was a cloudy night; the clouds broke away between one and two o'clock.

Q. 58. Do you mean to be understood that you noticed any stern sea?

A. I didn't notice any.

Q. 59. How soon after the collision did you notice that the mizzen sail of the American Union was down?

A. I don't notice when it was lowered down. I can't tell exactly. As soon as I went forward I noticed that it was down.

JAMES O'NEILL.

THE STATE OF OHIO,
Cuyahoga County, ss:

I, George D. Hinsdale, a notary public in and for the county aforesaid, duly commissioned and qualified, do hereby certify that the above-named Peter Lieb and James O'Neill were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and

157 that the depositions by them respectively subscribed, as above set forth, were reduced to writing by Geo. D. Hinsdale, he being a proper person, and not interested in the suit, in my presence, and in the presence of the witnesses respectively, and were subscribed by the said witnesses in my presence, and were taken at the time and place in the annexed notice specified, and continued from day to day, as above set forth.

I do further certify that I am not council, attorney, or relative of either parties, or otherwise interested in the event of this suit.

In witness whereof I have hereunto set my hand and seal of office this 24th day of September, A. D. 1872.

[SEAL.]

GEORGE D. HINSDALE,
Notary Public.

In the district court of the United States within and for the northern district of Ohio.

THE STATE OF OHIO,
Cuyahoga County, ss:

WILLIAM G. WINSLOW AND HEZEKIAH J.	}
Winslow, plaintiff,	
<i>vs.</i>	
THE SCHOONER S. S. OSBORN, B. O. WIL-	}
cox, claimant, defendant.	

The said libellants will take notice that on Tuesday, the 3rd day of December, A. D. 1872, the above-named defendant will take the
158 deposition of sundry witnesses, to be used as evidence on the trial of the above-entitled cause, at the office of Messrs. Rae and Mitchell, in room No. 63 in Central Union block, in the city of Chicago, county of Cook and State of Illinois, between the hours of 8 o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day between the same hours until they are completed.

PRENTISS AND VARCE,
Attorneys for Defendant.

We acknowledge service of the above notice, by copy, this 29th day of November, 1872.

WILLEY, CARY AND TERRELL,
Attorneys for Libellants.

Caption.

Depositions taken before me, J. L. Bennett, a notary public within and for the county of Cook, in the State of Illinois, pursuant to the annexed notice, at the time and place therein specified, to be read in evidence on behalf of the claimant in an action pending in the district court of the United States in and for the northern district of Ohio, in which William G. Winslow and Hezekiah J. Winslow are libellants, and the schooner S. S. Osborn (B. O. Wilcox, claimant) defendant. Present, John E. Carey, on behalf of the libellants, and Robert Rae, on behalf of the claim't.

159 JOHN FELL, a witness called and sworn on behalf of the claimant, testified as follows:

Direct examination by Mr. RAE:

Q. 1. Where do you live?

A. Erie, Pennsylvania.

Q. 2. What is your business?

A. Sailor.

Q. 3. How long have you been a sailor?

A. 14 years.

Q. 4. On the lakes?

A. No, sir; I have been four years on the lakes.

Q. 5. The other on the ocean?

A. Yes.

Q. 6. How old are you?

A. 25.

Q. 7. Do you know the schooner S. S. Osborn?

A. Yes, sir.

Q. 8. Do you know the schooner American Union?

A. Yes, sir.

Q. 9. Where was you on or about the 9th of August, 1872?

A. Somewhere in the vicinity of the Beaver, on board the Osborn.

Q. 10. Lake what?

A. Lake Michigan.

Q. 11. In what capacity were you there?

A. Before the mast; able seaman.

Q. 12. How long had you sailed in her?

A. All the season.

Q. 13. What trade has she been in?

A. Iron ore trade, between Erie and Escanaba all the season, until we went back to Cleveland.

160 Q. 14. Where were you bound?

A. Bound to Erie, as far as I understand. I was told we were bound to Erie; I don't know.

Q. 15. Loaded or light?

A. Loaded.

Q. 16. What with?

A. Iron ore.

Q. 17. What watch did you have?

A. I belonged to the starboard watch.

Q. 18. Where was you at that time?

A. I was below in the forecastle.

Q. 19. Did you have a collision?

A. Yes, sir.

Q. 20. Whereabouts did the collision happen?

A. About four miles or so off the Beaver light, between four and five.

Q. 21. With what vessel?

A. American Union.

Q. 22. You say you were below at the time?

A. Below at the time.

Q. 23. How long had you been below?

A. From eight o'clock.

Q. 24. Until what time?

A. I suppose it would be about ten minutes to twelve when the collision occurred.

Q. 25. At night?

A. Yes, sir; midnight.

Q. 26. What kind of a night was it?

A. It was a kind of a hazy night.

Q. 27. Moonlight?

A. No, sir; no moon.

161 Q. 28. What kind of wind had you?

A. It was a seven-knot breeze.

Q. 29. What brought you on deck?

A. The collision brought me on deck.

Q. 30. How soon after the collision occurred did you go on deck?

A. About four minutes after the collision.

Q. 31. Was you undressed?

A. No, sir, I wasn't undressed. I never do undress when I am on the lake; I leave my clothes on except my coat, hat, and boots.

Q. 32. Did you lay in the berth four minutes?

A. No, sir; as soon as the collision occurred I was out of my berth; as soon as the crack came I got up.

Q. 33. Did it take you four minutes to get up?

A. Yes, sir; we had to get assisted out of the forecabin.

Q. 34. Who assisted you?

A. Captain assisted me out and the mate.

Q. 35. How many were below?

A. There was four of us; there was three men and a boy.

Q. 36. Was you the last to go up?

A. I tried to get out another way, and I couldn't get through. The others got out while I was trying another way.

Q. 37. When you got out what did you do?

A. I saw a vessel laying alongside.

Q. 38. What vessel?

A. American Union.

Q. 39. Which side of you was she laying?

A. Port side.

Q. 40. How were her bows?

A. Her bows to our stern.

Q. 41. How did she appear in length to your vessel?

A. She was somewhere about the same length.

162 Q. 42. When you got up did you notice what sails she had up?

A. I looked at her; she had no mizzen.

Q. 43. Any other sails off?

A. I did not take any particular notice of any other sails.

Q. 44. Did you notice whether they were stowed away or came down by the ruin?

A. I believe they were stowed away. I went aboard after we got things a little straightened; they were stowed then.

Q. 45. How long did you remain aboard of your vessel before you went aboard of her?

A. About 8 minutes after the collision I was on board the American Union.

Q. 46. How soon after you got aboard did you go to see whether the mainsail was stowed away?

A. I didn't go to see that, but I took notice of that when I took the clothes on board; I took the passengers' clothes on board.

Q. 47. Did you notice what way the wind was that night?

A. Yes, sir; I took particular notice; the wind was to eastward of north.

Q. 48. How did you take particular notice?

A. I went aft and saw how our fly tailed; our fly tailed at about southwest of west.

Q. 49. Did you look at the compass?

A. Yes, sir; that is the way I found out. I did that after I came back from aboard the American Union. I just hove the clothes aboard and came right back again.

Q. 50. How long after you came on deck of your own vessel did you go aboard the American Union and come back?

A. I suppose it wouldn't take over ten minutes, the whole operation.

163 Q. 51. What else did you do to take particular notice—anything else?

A. Yes, sir; I took particular notice of the captain and the captain of the American Union. The captain of our vessel told the captain of

the American Union, "There is the north star; that is the fellow that never lies." The fly on his mizzen, you could tell by that; that was tailed out; you could see how it was by that.

Q. 52. What did the captain of the American Union say to that?

A. I didn't hear him say anything.

Q. 53. Did anything else occur that fixed the wind?

A. No, sir, not that I can think of; we went to work then and got things put to rights.

Q. 54. On your own vessel?

A. Yes, sir.

Q. 55. Did you sail with your vessel after the accident occurred?

A. Yes, sir.

Q. 56. I ask you if you sailed in your vessel after the accident occurred?

A. I thought you meant did I go out with her. No, sir; we didn't sail after the accident occurred. The American Union took us in tow.

Q. 57. What sails did the American Union carry at the time as she towed you?

A. I cannot say; I didn't take notice. I was at work on our own vessel, and didn't look at her then.

Q. 58. Did you take in your own sails?

A. Yes, sir, we took in our mainsail and mizzen.

Q. 59. What else did you keep up?

A. We kept none up.

Q. 60. Did you take any notice of the wind after she commenced towing you?

164 A. No, sir, I didn't take notice of it then; I was at work.

Q. 61. When you came on deck of your own vessel did you notice your own sails?

A. Yes, sir; I did.

Q. 62. What sails were up of your vessel?

A. Mainsail, main-gaff-topsail, mizzen, mizzen-gaff-topsail; that is all the sails we had up.

Q. 63. Where did I understand you to say this collision took place?

A. Off the Beaver, sir.

Q. 64. In what direction off the Beavers?

A. I could not say exactly what direction. I know the light was about four or five miles off. I could not tell the course, because I did not look to see. After the collision we drifted around.

Q. 65. Did you remain on deck the balance of the night?

A. Yes, sir, all the balance of the night—everybody.

Q. 66. Do you know of any points you passed during the night afterwards?

A. Yes, sir; we passed the Fox.

Q. 67. Do you know how you bore from the Foxes; when you passed them, which Fox was it?

A. The North Fox.

Q. 68. What time did you pass it?

A. We passed it, I believe, just about daylight—about five o'clock, I think; somewhere along there.

Q. 69. How far were you off from it; do you know?

A. We were away about five or six miles, I should judge.

Q. 70. Did you pass any other?

A. We passed the South Fox.

Q. 71. About what hour?

165 A. About seven I guess, or half-past seven.

Q. 72. Where were you towed to?

A. We were towed toward the Beaver.

Q. 73. What land did you first arrive at?

A. We arrived at no land. It fell a calm, and we lay there until a propeller took us in tow.

Q. 74. Where did the propeller take you in tow?

A. Between the Beaver and Fox.

Q. 75. Then you parted company with the American Union at that time?

A. Yes, sir; we left her.

Q. 76. How was the wind when you went below?

A. I don't know how the wind was. I didn't see the compass. I know we were by the wind, because we hauled the sheets aft before we went below.

Q. 77. When you came on deck after the collision, how far could a light be seen, light of a vessel?

A. Four or five miles, I guess.

Q. 78. How do you know that fact?

A. Because I could see the Fox light; I saw how plain that showed.

Q. 79. Did you see any other vessel lights afterwards?

A. No, sir; I did not.

Cross-examination by Mr. CAREY:

Q. 80. How far could you see the sails of a vessel that night, approaching broadside?

A. That I couldn't say, because I didn't see no sail.

Q. 81. About how far, judging from the character of the night?

A. I suppose about half a mile, or so.

Q. 82. Suppose you were approaching a vessel bearing two or
166 three points on your port bow, as the wind was when you came
on deck that night, how far could you see a fore-and-aft schooner
like the American Union's?

A. I couldn't say.

Q. 83. See the sails, I mean.

A. That I cannot tell.

Q. 84. About how far?

A. I can't say. If I had seen her, I might have known enough to make a calculation how far she was off.

Q. 85. Could you see the sails of a vessel of the size of the American Union, rigged as she was, when you came on deck off your port bow, 80 rods?

A. No, sir; I don't think I could.

Q. 86. You could see the fly perfectly plain on your mast-head?

A. Yes, sir.

Q. 87. Couldn't you see the sails of a vessel 80 rods, if you could see the fly?

A. That is not 80 rods.

Q. 88. Couldn't you see the sails of a vessel 80 rods off if you could see the fly?

A. That I can't tell.

Q. 89. Give me your judgment.

A. How far is 80 rods—I couldn't tell.

Q. 90. Say a quarter of a mile.

A. I can't say that I could have seen her a quarter of a mile or not.

Q. 91. Could you have seen her an eighth of a mile?

A. Yes, sir; I guess so.

Q. 92. You could have seen the sails of the American Union rigged as she was?

167 A. No, sir; not rigged as she was; you could if she had canvas all on her. If she had bright canvas same as we had. We had pretty bright canvas. I guess you could see our canvas that night.

Q. 93. See your canvas a quarter of a mile?

A. No, sir; not a quarter of a mile that night.

Q. 94. An eighth of a mile?

A. Yes, sir; I guess so.

Q. 95. How do you say the American Union was rigged when you saw her?

A. She had her mizzen in.

Q. 96. Her mizzen was down?

A. Yes, sir.

Q. 97. All the rest of her sails were set?

A. No, sir; the main-gaff-topsail was not set.

Q. 98. All the rest were?

A. I cannot say for all the rest. I didn't look at the rest.

Q. 99. How was the American Union rigged when you first came on deck?

A. Fore gaff-topsail, foresail, head sails, and mainsail.

Q. 100. Supposing that the American Union was approaching your vessel, rigged as you say she was, two points over your starboard bow with the wind as it was and you was on the lookout, could you have seen her that night at the time when you came on deck 80 rods off without any light?

A. I cannot say that. I didn't take that particular notice.

Q. 101. Give me your best judgment as a seaman, whether you could have seen her or not an eighth of a mile off, under those circumstances.

A. No, sir; I don't think I could.

Q. 102. How far off could you have seen her?

168 A. That I cannot tell.

Q. 103. Could you have seen her once her length?

A. Yes, sir; I guess if I had been on the lookout I could have seen her the length of herself off, I think.

Q. 104. You think you could have seen her about the length of herself off that night?

A. Yes, sir; I think so.

Q. 105. You could have seen the American Union that night when you came on deck, if you had been on the lookout, with all her canvass spread, as you have stated, just one length off?

A. Yes, sir; I believe I could.

Q. 106. You could not have seen her any further, could you; it was so dark?

A. I guess not.

Q. 107. How high is your mainmast on which the fly was?

A. I don't know what the height is.

Q. 108. How large is the fly on the top of the mast?

A. I suppose it is about the length of this room.

Q. 109. Fifteen feet long?

A. Yes, sir; I guess it is that.

Q. 110. Do you know?

A. I won't swear to it. I never measured it. I believe it is that long.

Q. 111. You could see that fly from the deck, couldn't you?

A. Yes, sir.

Q. 112. Is your mast a hundred feet long?

A. I don't know how high they are.

Q. 113. How long is the Osborn?

A. I don't know, sir.

Q. 114. How long is the American Union?

169 A. I don't know.

Q. 115. About how long?

A. I couldn't say how many feet she is.

Q. 116. You saw the stars that night?

A. Yes, sir; I saw the stars, certainly.

Q. 117. Many?

A. I saw stars; yes, sir.

Q. 118. Starlight night?

A. Overhead so, pretty bright.

Q. 119. A little hazy down by the water?

A. Yes; kind of hazy below.

Q. 120. Not much, was it?

A. Not extra.

Q. 121. How did Beaver Island light appear from you when you came on deck, from your vessel?

A. I don't know. I didn't take the bearing.

Q. 122. Did you see the red light of the American Union when you came on deck?

A. No, sir.

Q. 123. Didn't notice it?

A. No, sir.

Q. 124. Didn't notice any lights?

A. I didn't take notice of any lights.

Q. 125. On either vessel?

A. No, sir; not on either vessel.

Redirect examination by ROBERT RAE, Esq.:

Q. 127. When you came on deck of your vessel how were your sheets?

A. Flat aft, the main and mizzen; the fore boom lay on deck; the main boom was on top of the cabin, landed.

170 Q. 128. Had it been injured; broken in any way?

A. No, sir; when the foremast fell it let that go aft and it fell down on the cabin and lay there.

Q. 129. Your foremast broke, did it?

A. Yes, sir; and dropped down on deck amidships.

Recross-examination:

Q. 130. Did you notice which bow of your vessel was injured?

A. The port bow was injured most. I could see by the way the heel of the bowsprit was laying that he had struck us on our port bow; because he had split it and knocked it over to starboard, and the wreck went on that side, so I should suppose that is the way she struck us.

WILLIAM SMITH, a witness called on behalf of the claimants, being duly sworn, deposes as follows:

Direct examination by ROBERT RAE, Esq.:

Q. 1. What is your name, age, occupation, and place of residence?

A. William Smith; age, 32; occupation, sailor; I live in this country everywhere.

- Q. 2. How long have you been a mariner ?
A. This last fifteen years.
- Q. 3. How long on the lakes ?
A. About three years.
- Q. 4. Do you know the schooner S. S. Osborn ?
A. I suppose so.
- 171 Q. 5. Were you aboard of her this summer ?
A. I have been on board of her the whole season.
- Q. 6. Were you aboard of her on the 9th day of August, 1872 ?
A. I believe I was, sir.
- Q. 7. Had she a collision ?
A. Of course she had.
- Q. 8. What with ?
A. With the American Union, I suppose, sir.
- Q. 9. Where did it take place ?
A. It took place off the Beavers.
- Q. 10. On Lake Michigan ?
A. Yes, sir.
- Q. 11. About what hour ?
A. It was about 12 o'clock.
- Q. 12. Where were you at the time of the collision ?
A. I was down in the fore-castle asleep.
- Q. 13. How soon did you come up ?
A. As soon as I could.
- Q. 14. After or before the collision ?
A. After the collision.
- Q. 15. Had you your clothes on ?
A. Yes, sir; I always sleep with my clothes on at sea.
- Q. 16. When you came on deck what did you see ?
A. I seen the schooner alongside of us.
- Q. 17. The American Union ?
A. Yes, sir.
- Q. 18. How was her bow ?
A. It was toward our stern.
- Q. 19. Which side of you ?
A. On the port side of us.
- Q. 20. Do you know which way the wind was when you got on deck ?
A. I never took notice of the wind.
- 172 Q. 21. What did you take notice of ?
A. I took notice that the mast was down and the bowsprit out and one thing and another.
- Q. 22. Of your vessel ?
A. Yes, sir.
- Q. 23. You don't know which way the wind was that night when you came on deck ?
A. I never look at the compass.
- Q. 24. Do you know whether it had been raining that night ?
A. I couldn't tell, but it was very dark.
- Q. 25. How far could a light be seen that night ?
A. It is very hard to say ; it is according to what kind of a light it is.
- Q. 26. A vessel's light, of course.
A. If it was well trimmed I dare say you could see it a mile. His'n could not be seen, I don't think.
- Q. 27. I am not asking you about his.
A. A light could be seen a mile or two miles.

Q. 28. How far could the hull of a vessel without a light be seen with the sails up?

A. Well, you couldn't see it 20 rods, I don't think.

Q. 29. Would it make any difference whether she was approaching you broadside or end on as to seeing her?

A. I don't think it would make any difference.

(Corrected hereinafter.)

Q. 30. You think you could see her just as well one way as the other?

A. If she had lights up.

Q. 31. If she had no lights up?

A. You could see her just as well one way as another, because there was a lookout all around.

173 Q. 32. You don't understand me, I guess. Can you see a vessel approaching you end on, as well as you can if you see her broadside, with her sails up?

A. Not quite as well; of course not.

Q. 33. Did you hear any conversation between the captain of the Osborn and the captain of the American Union?

A. All I heard that the captain of the American Union said that he was heading west.

Q. 34. That is all the conversation you heard?

A. That is all the conversation I heard.

Q. 35. Did you notice where the collision took place?

A. Off the Beavers.

Q. 36. How far off?

A. That I could not say; very close to it, though, I believe.

Q. 37. Did you notice how her sails were trimmed when you got on deck; that is the bark American Union?

A. I never took notice how her sails were trimmed. No, sir; I did not.

Q. 38. How were her booms trimmed?

A. I never took notice of the booms.

Q. 39. Do you know what I mean by sheets? I mean her canvas. Did you notice what sails she had on?

A. I only saw a mainsail and foresail, but I didn't see any mizzen.

Q. 40. Did you look for the mizzen?

A. I didn't look particularly, but I didn't see none.

Q. 41. Do you think you would have seen it if it had been on?

A. I was bound to see it if it was on.

Q. 42. Do you know whether it was stowed away or not?

A. I couldn't say if it was stowed away or not.

Q. 43. Didn't examine that?

A. No, sir; I never thought of it at the time.

174 Q. 44. How were your sails?

A. Our sheet was flat aft when I came on deck.

Q. 45. Did you find any of your booms on deck?

A. Yes, sir.

Q. 46. Which one.

A. The fore-boom was laying amidships and the main boom was about six feet from the rail.

Q. 47. Which side of the rail?

A. On the starboard side?

Q. 48. In board?

A. In board, yes, sir.

Q. 49. The foreboom was amidships?

A. Yes, sir, about amidships.

Q. 50. The foremast carried away?

A. Yes, sir.

Q. 51. Which way did it lay over?

A. It was laying on the port side a little.

Q. 52. Did it fall forward or aft?

A. It fell aft, sir.

Q. 53. What passengers had you aboard, any?

A. Yes, sir.

Q. 54. Who were they?

A. Had five women.

Q. 55. Did you put them aboard the American Union?

A. Yes, sir.

Q. 56. Do you know how the wind was when you went aboard that night?

A. I never took notice of the wind, but I know the sheet was aft at seven o'clock.

Q. 57. What did you do after the collision?

A. We sounded the pumps and pumped her out.

175 (Upon reading the testimony over the witness makes the following correction after the answer to the 29th question):

I didn't understand that fairly when you asked me the question, because a man of common sense knows that you can see better with broadside than head to.

Cross-examination by Mr. CAREY:

Q. 58. When you came on deck just after the collision, could you see stars?

A. No, sir; I couldn't then.

Q. 59. You can't remember.

A. I couldn't see no stars that I could remember because it was very dark when I came on deck. I couldn't see nothing hardly for as good as five minutes.

Q. 60. After you had been on deck for a while, do you remember seeing the loom of the land, Beaver Island?

A. I never looked for it.

Q. 61. Don't you recollect looking to see if you could see your fly, or the fly of the Union?

A. No, sir; I never looked for that either.

Q. 62. Did you see any other lights?

A. I seen the American Union's lights; they were burning very dim.

Q. 63. Nobody asked you for that.

A. Oh!

Q. 64. What made you notice the light of the American Union particularly?

176 A. Because I happened to look at it, and I called the captain and told him he better have them lights in his cabin than have them where they are, because they are no use there.

Q. 65. Why?

A. Because we couldn't see it.

Q. 66. What was the reason?

A. They were burning very dim in the first place, and in the second place they were in the mizzen rigging where they could not be seen forward.

Q. 67. Are you sure they were in the mizzen rigging?

A. Sure.

Q. 68. Forward of the mizzen rigging?

A. They were in the mizzen rigging. I don't know if they were before the mizzen-rigging, aft the mizzen-rigging, or in the mizzen rigging, but they were close to the mizzen rigging or in the middle of it.

Q. 69. They were on the outside of the American Union?

A. Yes, sir.

Q. 70. Did you look at your own lights at the same time?

A. We had no lights at the same time.

Q. 71. No lights on your vessel?

A. No, sir; not when I looked at the American Union's lights because our lights were broke.

Q. 72. Was your port light broken?

A. Both of them were broken.

Q. 73. Both the port and starboard lights?

A. Yes, sir.

Q. 74. By the collision?

A. I suppose they were broken by the collision.

Q. 75. You don't know, do you?

A. I don't know if they were broken before that or not, but they were broken when I came on deck.

177 Q. 76. What kind of a night was it at the time you came on deck?

A. It was very dark.

Q. 77. You don't believe that you could see the canvas of a vessel that night once her length? You could not have seen the canvas of the American Union as she was approaching more than once her length off, could you?

A. I could not when I came on deck.

Q. 78. If you had been on the lookout of the Osborn could you have seen the canvas of the American Union over once her length?

A. If I had stood on the forecastle I don't think I could.

Q. 79. Suppose you had been on the lookout of the Osborn that night at the time when you came on deck, could you have seen the canvas of the American Union approaching you two points on your starboard bow?

A. I don't hardly think I could.

Q. 80. Once her length?

A. Well, I dare say I could see her once her length.

Q. 81. Do you know that the captain saw the north star that night, right after the collision?

A. I heard them speak about it, but I did not hear him have any conversation with the captain of the American Union about it.

Q. 82. When you can see the north star in the night it can't be a very bad night to see objects on the water, can it?

A. Of course not, when you can see the north star, but the whole night isn't alike though.

Q. 83. Answer my question. Is it a bad night to see objects on the water when you can see the north star.

A. No.

178 Q. 84. It must be a pretty bad night when you can only see the sails of a vessel once her length off?

A. Well, the finest night you ever saw you might not see them; because, if it is cloudy and dark you can't see nothing.

Q. 85. You don't mean to swear that you could not see on a night like this was when you came on deck, and you could see the north star,

and the captain saw the north star, that you couldn't see the sails of the American Union once her length off, do you?

A. It cleared up. After I had been on deck a while the stars came out.

Redirect examination by Mr. RAE:

Q. 86. You stated to the captain that the bark American Union lights might as well be in the cabin as where they were?

A. I did, sir.

Q. 87. Which captain did you state that to?

A. To my captain sitting there now.

Q. 88. Did you state it to the captain of the American Union?

A. No, sir; I did not.

Q. 89. Did you state it in his hearing?

A. I don't know if he was around or not. I couldn't tell.

(The proctor for the libellant objects to the conversation that occurred between the witness and the captain of the Osborn as related by him.)

179 JOHN McDONALD, a witness called and sworn in behalf of testified as follows:

Direct examination by Mr. RAE:

Q. 1. What is your name and age?

A. John McDonald; 28 years of age.

Q. 2. What is your business?

A. Seaman.

Q. 3. What is your residence?

A. Erie at present—that is, when I get home I am at Erie.

Q. 4. That is your home?

A. Yes.

Q. 5. How long have you been a mariner?

A. About 13 years.

Q. 6. How long on the lakes?

A. This is the third season I have passed on the lakes.

Q. 7. Do you know the schooner Osborn?

A. I have been on the schooner Osborn since the latter end of July, I think. I think it was then I joined her.

Q. 8. Were you on board of her the 9th day of August, 1872?

A. The time of the collision?

Q. 9. Yes.

A. Yes, sir, I was there.

Q. 10. What post did you hold?

A. I was in bed sleeping—able seaman.

Q. 11. You were in the watch below?

A. Yes.

Q. 12. Were you on deck at the time of the collision?

A. No, sir.

Q. 13. Brought on by the collision?

180 A. The first crash, I got on my feet, and to stand and wait until it was all over before I dared venture on deck.

Q. 14. You mean by that you waited until everything tumbled down before you went on deck?

A. Yes; I did not dare to go on deck until it was all over.

Q. 15. When you came on deck what did you see?

A. I saw the foremast gone; I saw the American Union lying alongside of us.

Q. 16. Where did you find your fore-boom ?

A. Laying between the mainmast and the main-rigging.

Q. 17. Was it on the larboard or starboard side, or amidships ?

A. On the starboard side.

Q. 18. How far over ?

A. Half way.

Q. 19. Half way between that and amidships ?

A. Half way between that and amidships. The end of the boom might be a little more towards the rigging line. It was just at the stretch of the sheet.

Q. 20. Lying on the deck ?

A. Lying on the decks.

Q. 21. Where did you find the main-boom ?

A. The main-boom was on the top of the cabin.

Q. 22. Broken ?

A. No, sir.

Q. 23. You saw the bark American Union there ? How did she lay alongside of you ?

A. Her stern was at our bows.

Q. 24. About the same length as you were ?

A. Well, I guess so pretty much.

Q. 25. You were both three-masters ?

A. Yes.

Q. 26. Did you notice where her lights were hung ?

181 A. I did not take so much notice. I did notice that they were at the mizzen rigging, but the precise spot I cannot say.

Q. 27. Do you know whether they were burning brightly ?

A. No, sir ; I did not take notice whether they were. I know I saw her red light, but that is all.

Q. 28. What kind of a night was it for seeing ?

A. I did not take so much notice of that.

Q. 29. You do not know whether it was dark or light ?

A. No, sir.

Q. 30. Did you notice how the American Union's sails were ?

A. I did not notice anything except taking in the fore gaff top sail ; and one of our men went to assist in taking it in, and I was surprised that he went to work for them and our vessel in such a state ; but that is all.

Q. 31. Did you notice what sails were taken in on-board of her at the time you got on deck ?

A. Her mizzen was in as far as I could see.

Q. 32. Any other sails ?

A. No, I did not notice any except the gaff top-sail.

Q. 33. What man was it that left your vessel to assist in taking in the fore gaff top-sail ?

A. Peter Bowdy.

Q. 34. You do not know how far the collision occurred off Beaver Island.

A. I could not say.

Q. 35. Do you know which way the wind was when you came on deck ?

A. I did not look to see how the wind was.

Q. 36. Did you look after you came on deck ?

A. No ; I looked at how the sheets was when I came on deck, they were flat aft.

182 Q. 37. On what vessel ?

A. On the Osborn.

Q. 38. And that is all you did see?

A. That is all I did see. I heard a little afterwards—not much.

Q. 39. What did you hear afterwards?

A. I heard Captain Seamens ask—there was some noise, exactly I cannot say—but there was some talk about hurrying up to get clear. Captain Seamens asked where we was, that we were in a hurry, and wanted to get away, and says he—

Q. 40. Who says?

A. Captain Seamens asked where we was. Well, says he—

Q. 41. Who says? Captain Seamens asked, and who answered?

A. I don't know exactly the man who answered. It was one belonging to the American Union. He said, "We will be down on the North Fox soon," says he "I want to get my anchor clear in case of an accident."

Q. 42. Anything else did you hear?

A. No, sir.

Q. 43. That is all you heard?

A. That is all I heard that I remember.

Q. 44. Did you see your captain show the captain of the American Union the north star?

A. I did not; I was not there.

Q. 45. Did you see the north star?

A. I did not look for it. I might have seen it, but I did not look for it.

Q. 46. You think if you had looked for it, and it had been there you would have seen it?

183 A. Yes, I know it when I see it, but I did not look for it. I was much too confused.

Cross-examination by Mr. CAREY.

Q. 47. This was not a very dark night; was it?

A. Well, it was pretty dark. It was one of these kind of rainified nights—dark; but you could see lights, I guess, far enough to avoid a collision.

Q. 48. See canvas far enough off to avoid a collision, could you not?

A. No, sir; I do not think it.

Q. 49. Could you see canvas the length of the vessel?

A. You might see canvas the length of the vessel, but that is not far enough off to avoid a collision in certain cases.

Q. 50. Did you look to see if you could see your fly?

A. I did not.

Q. 51. Did you look at the time when you saw the Beaver Island light; did you see the loom of the land?

A. No, sir; I did not look for the loom of the land at all, I just remember seeing the light, that is all. There is one good reason for not being so accurate in my statements. I was pretty well terrified.

Q. 52. That will account for your not seeing the north star, and for not seeing canvas for a distance.

A. I did not think it was any of my business to look after anything, only to do as I was told.

JOHN BAKER, a witness called and sworn on behalf of respondent, testified as follows:

184 Direct examination by Mr. RAE.

Q. 1. What is your name and age?

A. John Baker; age about 32, I guess.

- Q. 2. What is your business ?
A. Sailing.
- Q. 3. Where do you live ?
A. In Erie, Pennsylvania.
- Q. 4. How long have you been a mariner ; how long have you been a Jack ?
A. About eighteen years.
- Q. 5. How long on the lakes ?
A. About four or five years.
- Q. 6. On the lakes about four or five years ?
A. Five years.
- Q. 7. Where did you sail last summer ?
A. I sailed here on the lakes last summer.
- Q. 8. In what schooner ?
A. The Osborn for one, the H. F. Marie for another, and the scow Frank Wilcox for another.
- Q. 9. Did you have a collision on or about the 9th of August, 1872, while you were on board the Osborn ?
A. When we had the collision with the American Union I was on board.
- Q. 10. Were you above or below at the time ?
A. I was below.
- Q. 11. Did you come on deck before the collision ?
A. No, sir.
- Q. 12. How soon after the collision ?
A. As soon as I heard the cracking, as soon as I could get out I got out.
- 185 Q. 13. When you got out what did you observe about the night, was it bright moonlight or dark ?
A. No, sir ; it was a very dark night.
- Q. 14. It had been raining ?
A. Not that I know of ; it might have been raining during the watch below. I cannot say but it was very dark.
- Q. 15. You didn't hear of its raining ?
A. No, sir.
- Q. 15. a. State what you saw of your own vessel, first, how were the booms ?
A. The main boom was lying flat down on the cabin.
- Q. 15. b. How was your fore boom ?
A. That was lying amidships down on deck when I got out.
- Q. 16. Where was your foremast ?
A. Laying down on deck, too.
- Q. 17. Was it your watch below ?
A. It was my watch below when this happened. I came on deck, of course, when the collision was.
- Q. 19. How did the American Union lay ?
A. It laid right alongside of us when I came on deck.
- Q. 18. How did you find your sheets trimmed ?
A. Right flat by the wind, as flat as we could get them.
- Q. 20. Did you notice what sail she (A. Union) had taken in ?
A. I did not notice exactly ; she did not have any mizzen on, I noticed that.
- Q. 21. How soon did you notice that after you came on deck ?
A. Well, I suppose about five minutes after. I could not say.
- Q. 22. Did you see anybody taking it in ?
A. No, sir.

- Q. 23. Did you notice where her lights were?
A. Her lights were aft.
- 186 Q. 24. Whereabouts?
A. On the quarter by the mizzen rigging?
- Q. 25. That is the American Union's lights?
A. Yes.
- Q. 26. Did you notice whether her mainsail was reefed or not?
A. Her mainsail was reefed.
- Q. 27. Do you know which way the wind was that night?
A. I know exactly how the wind was at eight o'clock?
- Q. 28. How was it at eight o'clock?
A. When I went below at eight o'clock we were heading E. $\frac{1}{2}$ N. to E. by N., because the wind was not very steady; the wind was about east by north, half east, something like that at eight o'clock.
- Q. 29. You were steering how?
A. East half north, and sometimes east by north.
- Q. 30. Did you hear any conversation between your master and the other master?
A. No, sir.
- Q. 31. Did you see the north star?
A. I did after the collision.
- Q. 32. How long after?
A. Well, I should say it was about twenty minutes, as near as I could guess.
- Q. 33. Did it begin to clear up—brighten up?
A. Well, it cleared up then; yes.
- Q. 34. You did not hear anything said about the direction of the wind after the collision, did you?
A. All I heard said our captain told us.
(Objected to.)
- Q. 35. Did he state it in the presence of the other captain?
A. That I did not see, but I heard our captain talking.
- 187 Q. 36. Did you go to the compass after you got on deck and look?
A. Yes.
- Q. 37. How did you find the wind then?
A. North by east.
- Q. 38. How soon after you came on deck did you go to the compass?
A. About ten or fifteen minutes, as near as I could guess.
- Q. 39. Are you sure of that?
A. I am sure of that.
- Q. 40. How do you remember that? How did you come to go to the compass and look?
A. Because our captain said he had just been showing the captain of the American Union how the wind was, and I went aft and looked, and that was the thing that brought me to look at the compass.
- Q. 41. Do you know how far this occurred off Beaver Island?
A. I suppose about three miles, as near as I can come to it.
- Q. 42. Were you taken in tow by the American Union there?
A. Yes, she tried to tow us.
- Q. 43. Did you stay on deck during the rest of the night?
A. Yes.
- Q. 44. What did you pass during the time?
A. The North Fox and the South Fox.
- Q. 45. What time did you pass them, and how far from them, and how did they bear?

18 A. We were abreast of the South Fox about 6 o'clock, I should say.

Q. 46. How did it bear away from you?

A. Beaver Island bore to the north of us.

111 Q. 47. How did the North Fox and the South Fox bear?

A. The South Fox bore to the south of us.

188 Q. 48. How far off were you from them?

A. I should say about four miles off the South Fox.

Cross-examination by Mr. CAREY:

Q. 49. How long after the collision was it that you went to look at the compass to see how the wind was?

A. I should say about fifteen minutes, as near as I could guess.

Q. 50. You did not notice the stars that night, did you?

A. I did.

Q. 51. When you came on deck?

A. No, sir; it was dark then.

Q. 52. It was between that time and the time you went to look at the compass?

A. The stars came out about fifteen to twenty minutes after I came on deck.

Q. 53. Was it a starry night?

A. It was not very starry. I could not call it exactly starry, but there was a fresh breeze blowing.

Q. 54. Blowing a pretty sharp breeze, seven or eight knots?

A. We were going about 7 or 8 knots, 7 knots I should say the most.

Q. 55. Was it foggy?

A. No, I cannot say it was foggy; it was dark, a real dark night.

Q. 56. You do not have fog very often with a stiff breeze, do you?

A. Yes; sometimes we will have fog with a stiff breeze, too.

Q. 57. Do you often have fog with a stiff wind from the north?

A. Well, it may be sometimes. I don't know exactly.

189 Q. 58. You have seen a great deal darker nights than this, haven't you?

A. I do not think I have, not much darker. It looked to me very dark when I came on deck.

Q. 59. You were somewhat frightened, were you not, when you came on deck?

A. I was until I found out how we were situated.

Q. 60. So you do not know whether the stars were shining when you came on deck or not?

A. There was no stars out when I came on deck. I know for certain.

Q. 61. Did you look?

A. I was bound to look for something, because I could not see anything.

Q. 62. Did you look to see your fly when you came on deck?

A. I did when I looked at the compass, but when I came on deck first I had something else to look after excepting the fly.

Q. 63. What was you looking after?

A. I was first to find out if we were going to sink, and then I wanted to find out what was up.

Q. 64. Did it take you fifteen minutes to ascertain that?

A. No, sir; it did not.

Q. 65. What did you do in the balance of the time?

A. We sounded the pumps, and we made a line fast to the American Union; such things as that.

Q. 66. You had no difficulty in seeing around the deck and getting at what you wanted, did you?

A. Yes, sir; I had great difficulty.

Q. 67. One of the worst nights you ever saw on the lakes, wasn't it?

A. No, sir; it was not.

190 Q. 68. Darkest?

A. It was just about as dark, because I told you I just came out of the cabin, and, being half asleep, I thought it was very dark, as dark as anything could be.

Q. 69. It continued very dark; the darkest night you ever saw up to about the time you went to see the compass, a very bad night up to that time.

A. It was very dark.

Q. 69. And then all at once it cleared up and you saw the north star?

A. It cleared away fifteen or twenty minutes after I came on deck.

Q. 70. Was it the weather cleared away or your head cleared away?

A. My head was clear enough when I came on deck, but the weather—you know the sky broke.

Q. 71. Which was it that was in trouble, your head or the weather when you came on deck?

A. I don't think there was much trouble in my head or the weather to tell the truth.

Q. 72. It cleared away about the time you went to see the compass?

A. Yes.

Q. 73. All at once?

A. It got clear; the stars came out.

Q. 74. Bright?

A. The stars came out quite bright.

Q. 75. And cleared up on the water pretty well?

A. Yes.

191 Q. 76. When it cleared up on the water, could you have seen the canvas of a vessel approaching you at the time when you went to look at the compass, approaching on your starboard bow, say two points?

A. When it cleared up do you mean?

Q. 77. Yes; could you have seen it a quarter of a mile off?

A. After it was cleared up; yes, I could.

Q. 78. Half a mile?

A. I dare say we could half a mile.

Q. 79. Then you could not have seen it at all when you came out of the cabin?

A. I could not.

Q. 80. Do you think the lookout could at that time on your vessel?

A. I think it would have been pretty to see it.

Q. 81. When you came out of the cabin?

A. Yes.

Q. 82. Was it the trouble that the weather was so bad, or was something the matter with your eyesight?

A. My eyesight is real good, thank God.

Q. 83. I mean at that time?

A. At that time real good, too, straight as could be.

In U. S. district court, northern district of Ohio.

WILLIAM G. WINSLOW ET AL., LIBELLANTS;
vs.
 SCHOONER S. S. OSBORN, B. O. WILCOX,
 claimant.

It is stipulated in the above-entitled cause that the evidence this day taken at Chicago by J. L. Bennett, notary public, on behalf of the claimant, may be taken by the notary in "short-hand," and the signature of the witnesses is waived and signed by the notary for them.

ROBERT RAE,

Proctor for Claimant.

WILLEY, CAREY AND TERRELL,

Proctor for Libellants.

NORTHERN DISTRICT OF ILLINOIS, ss:

I, J. L. Bennett, a notary public duly appointed in and for the city of Chicago, county of Cook, and State of Illinois, do hereby certify that the reason for taking the foregoing depositions is, that the testimony of the witnesses aforesaid is necessary in the cause in the caption of the said depositions named, and that said witnesses live at a greater distance from the place of trial than one hundred miles; that said testimony was taken upon reasonable notice given in writing by the respondent to the libellant attorneys of record. That on the 4th day of December, 1872, I was attended by John C. Carey, proctor for the libellant, and Robert Rae, who appeared for the respondent, and by the said witnesses, and each of the witnesses was by me carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and the testimony by him given was by me reduced to writing; that said testimony was taken by consent of the parties present, and the signatures of the witnesses were waived by stipulation, and that I am not of council or attorney to either of the parties, nor in any way interested in the event of the cause named in the said caption.

In witness whereof I have hereunto set my hand and seal this 5th day of December, A. D. 1872.

[SEAL.]

J. L. BENNETT,

*Notary Public in and for the City of Chicago,
 Cook County, Illinois.*

THE STATE OF ILLINOIS,
 Cook County, ss:

I, J. L. Bennett, a notary public in and for the State and county aforesaid, duly commissioned and qualified, do hereby certify that the above-named witnesses, John Fell, William Smith, John McDonald, John Baker, were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions were reduced to writing by myself and A. L. Devison, he being a proper person and not interested in the suit, in my presence and in the presence of the witnesses respectively, and the signatures of the witnesses were waived as by stipulation hereto annexed, in my presence, and were taken at the time and place in the annexed notice specified, and continued from day to day, as above set forth. I do further certify,

that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit; that all informalities in the taking of the depositions and certifying same were waived.

In witness whereof I have hereunto set my hand and seal of 194 office this 5th day of December, A. D. 1872.

[SEAL.]

J. L. BENNETT,

*Notary Public in and for the City of Chicago,
Cook County, Illinois.*

In the U. S. district court within and for the northern district of Ohio.

THE STATE OF OHIO,

Northern District, ss:

W. G. WINSLOW ET AL., LIBELLANTS,

vs.

SCHOONER S. S. OSBORN AND B. O. WILCOX, claimant and cross-libellant, defendant.

In admiralty.

The libellants will take notice that on Monday, the thirteenth day of January, A. D. 1873, the above-named cross-libellants will take the deposition of Peter Bondy and Sylvester Smith, sundry witnesses, to be used as evidence on the trial of the above-entitled cause, at the office of Lathy and Lathy, attorneys at law, in the city of Erie, county of Erie, and State of Pennsylvania, between the hours of one o'clock a. m. and 9 o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

PRENTICE & VARCE,

Att'ys for Claimants and Cross-Libellants.

I acknowledge service of the above notice by copy, this 8th day of Jan., 1873, and waive all objections to form of notice and to 195 time.

WILLEY, CARY AND TERRELL,

Attorney for Libellants.

Caption.

Depositions taken before me, A. D. Farce, a deputy clerk of the United States circuit court, within and for the western district of Pennsylvania, pursuant to the annexed notice, at the time and place therein specified, to be read in evidence on behalf of the cross-libellants, in an action pending in the United States district court in admiralty, in and for the northern district of Ohio, in which W. G. Winslow et al., libellants, are plaintiffs, and schooner S. S. Osborn and B. O. Wilcox, claimant and cross-libellant, are defendants.

Present, H. L. Terrell on behalf of the libellants, and George W. Lathy and Son on behalf of the cross-libellants.

SYLVESTER SMITH, of lawful age, being by me first duly sworn, as hereto specified, deposes and says as follows:

1. Question. (By GEO. W. LATHY & SON). State your name, age, occupation, and place of residence.

Answer. My name is Sylvester Smith. I am 38 years of age. I am a seaman by occupation, and I reside in Erie, Erie County, and State

of Pennsylvania. I was steward on the schooner S. S. Osborn, from some time in July, A. D. 1872, until some time in September, A. D. 1872. On the 9th day of August, 1872, when our schooner, the Osborn, was off the head of the Beavers, at the foot of Lake Michigan, at 196 about eleven o'clock and forty-five minutes p. m. I heard the crash occasioned by the carrying away of our bowsprit. When I opened the kitchen door to come on deck the foremast was falling aft. When I got on deck it was so dark I could not see the vessel's length; then the American Union swung alongside of us. After the American Union swung alongside of us we got the women aboard of us transferred to the American Union; then Captain Parsons came aboard of us, and Captain Seamans took him aft to the binnacle, and showed him how we was heading. Before this it was so cloudy you could not see a vessel's length; but at this time the sky changed, and it was quite light when they were at the compass. Captain Seamans told Captain Parsons, "you can see where our sheets lay, they were as close aft, short on the wind as they could be, and keep our course." Captain Parsons replied, "I saw your green light some time before I struck you, but could not see any other light." The vessel was sharp on the wind when I came on deck. The sheets were flat aft. The main boom, which was as far aft as possible after the collision, was not changed from its position until some time after we left for Cleveland. Captain Parsons was examining our charts soon after the collision, and said he was afraid we were drifting upon the North Fox island. I don't know why Captain Parsons asked for our chart.

Cross-examination by H. L. TERRELL, att'y for libellants:

- Q. 2. How far from Beaver Island light did the collision occur?
 197 A. About seven miles from Beaver Island light.
 Q. 3. What time did you turn in that night?
 A. I turned in about 9 o'clock.
 Q. 4. Where was your bunk?
 A. On the port side.
 Q. 5. Did you remain in your bunk from the time you turned in until the collision?
 A. Yes, sir.
 Q. 6. Were you asleep at the time of the collision?
 A. Yes; I was asleep at the time.
 Q. 7. Was there a light in the kitchen as you passed through?
 A. No, sir; the light was out in the kitchen when I got up.
 Q. 8. What passage did you go through from Escanaba?
 A. I cannot say.
 Q. 9. What time did you go through the passage?
 A. I could not say, sir.
 Q. 10. Did the main boom fall before or after you came on deck?
 A. After I came on deck.
 Q. 41. Did it fall before or after your vessel swung around from the force of the collision?
 A. I did not see it fall, but discovered it when I was aft.
 Q. 12. Where was you when Captain Seamans and Captain Parsons were aft at the binnacle?
 A. I was aft myself; was aft the binnacle while they were there.
 Q. 13. What were you doing?
 A. I had a hand-lantern in my hand, and was holding it for Seamans and Parsons to see.
 Q. 14. Who else was aft at that time?

A. No one but the two captains and myself.

Q. 15. Where were the balance of the crew?

198 A. All forward and about the decks.

Q. 16. It was at this time that the conversation between the two captains which you have narrated in your direct examination took place?

A. Yes, sir.

Q. 17. Where did the two captains go after leaving the binnacle?

A. Into the cabin.

SYLVESTER SMITH.

PETER BONDY, of lawful age, being produced, sworn, and examined on part of cross-libellants, by Lathy and Son, did testify as follows, to wit:

My name is Peter Bondy; I am twenty-one years of age; I live in Erie, Erie County and State of Pennsylvania; my occupation is that of seaman.

Q. Was you employed on the schooner Osborn during August, A. D. 1872; and, if so, in what capacity?

A. I was; I was sailing before the mast.

Q. Was you on board the said schooner at the time of the collision with the American Union?

A. Yes, sir.

Q. State when the collision occurred.

A. It was in August, on Friday evening, I think. I don't recollect what day of the month.

Q. Where was you when the collision occurred?

A. I was at the aft pump.

Q. What time in the day or night did the collision occur?

A. It was about ten minutes before twelve.

Q. Where were the vessels at the time of the collision?

199 A. About 3 miles off the "Skillagalee" light or Foxes light, I am not certain which.

Q. What was you doing at the pump?

A. I was pumping.

Q. What was the effect of the collision upon the Osborn?

A. It took away her bowsprit, foremast, jib booms, gallant forecastle, and damaged the rail.

Q. At time of the collision was it dark or moonlight?

A. It was dark.

Q. Was it very dark?

A. Yes; it was pretty dark.

Q. How far could you see in the darkness?

A. About a ship's length.

Q. After the collision what did the American Union do?

A. She came alongside of us and remained alongside for about two hours.

Q. What canvas did the American Union have on at the time of the collision?

A. She had on her foresail, mainsail, fore gaff-top sail, and some of her jibs; I think her fore-stay sail, jib, and flying jib.

Q. How was the canvas of the Osborn trimmed just before the collision?

A. She was flat aft.

Q. What canvas had the Osborn on at that time?

A. She had all her canvas on that time.

Q. Did the Osborn have her square sail and raffey on at that time?

A. I think the raffey was on, but that the square sail was not on.

Q. Was any one else on deck at the time of the collision but yourself?

A. Yes, sir. I now think the square sail was set, and the raffey was off. I now think they were both off.

Q. Who were they?

A. The mate, Wesley Seaman; James McNeil, a sailor; Peteo Leib, a sailor.

Q. Who was at the wheel?

A. Peter Leib, sir.

Q. Who was was on the lookout?

A. I was, sir.

Q. How long before the collision had you gone to the pumps?

A. About four minutes or so.

Q. Before you left the lookout, did you see any light?

A. No, sir.

Q. When you say you saw no light, did you mean a vessel's light or the beacon light?

A. I saw the light-house, but did not see any vessel's light.

Q. At daylight next morning how far was you from South Fox?

A. I don't know, sir.

Q. Did you see a propeller at the wood-docks at South Foxes?

A. Yes, sir.

Q. Did you see the propeller plainly?

A. Yes, sir.

Cross-examination by H. L. TERRELL, Esq., on part of libellants:

Q. Whose watch was you on?

A. On the mate's watch.

Q. What time did your watch come on deck that night?

A. At eight o'clock.

Q. What was your post from, 8 to 10?

A. On the lookout?

201 Q. Where were you the balance of the time?

A. It was my look-out from 8 to 12 all the time.

Q. Which way did the light which you say you were about three miles from at the time of the collision, bear from you?

A. Off the port bow.

Q. Which way were you heading at that time?

A. I could not tell; somewhere along east, I should judge.

Q. How were your canvas trimmed when you came on deck at 8?

A. The sheets were chock aft.

Q. What time did you come through the passage from Escanaba?

A. It was between four and six in the afternoon.

Q. How many men did it take to man your pumps?

A. Three men.

Q. What would be the position of three men at the pumps while manning it?

A. Two on the port side and one on the starboard.

Q. Couldn't two men man the pumps?

A. Not very easy, sir.

Q. How many men do you usually have to work your pumps?

A. All hands when they were on deck.

Q. Who called you aft from your post on the lookout?

A. The mate, sir.

Q. At the time of the collision, then, all the men on deck were at the pumps, except the man at the wheel?

A. Yes, sir.

Q. Where was the pump situated?

A. Aft the main-mast; one on the port and one on the starboard side.

Q. Describe the position of the mate, O'Neil, and yourself at the pumps.

A. I have forgotten the position.

Q. On which side of your main sheet were you?

A. On the port side.

Q. How long before the collision did you first see the American Union?

A. About 12 or 15 seconds, I should think.

Q. What part of her did you first see?

A. Her bow.

Q. From which side did she approach you?

A. On our starboard bow.

Q. Who first saw her?

A. I couldn't tell you, sir.

Q. Where were you after the collision; say, for ten or 15 minutes?

A. I was on the deck of both the Osborn and the American Union.

Q. What others of the crew were with you?

A. They were all about the decks; I can't tell who was with me.

Q. At what point did you get aboard the American Union?

A. Forward.

Q. Who else was aboard the vessel besides the officers and men?

A. Some women passengers.

Q. How many of them?

A. Five of them.

Q. Who were they?

A. Mrs. Wilcox and daughter; the rest I don't know by name.

PETER BONDY.

203 UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

[SEAL.] I, A. D. Force, deputy clerk of the circuit court of the United States for the western district of Pennsylvania, duly qualified and commissioned by the judges of the third judicial circuit, do hereby certify that the above named Sylvester Smith and Peter Bondy were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them respectively subscribed as above set forth, were reduced to writing by me and in the presence of the witnesses respectively, and were subscribed by the said witnesses in my presence, and were taken at the time and place in the annexed notice specified.

I do further certify that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Erie, in said district, this 14th day of January, A. D. 1873.

A. D. FORCE,
Dep'ty Clk and U. S. Com'r.

204 In the district court of the United States within and for the northern district of Ohio.

THE STATE OF OHIO,
Northern District, ss:

WILLIAM G. WINSLOW AND HEZEKIAH J.	}
Winslow, libellants,	
<i>against</i>	
THE SCHOONER S. S. OSBORN AND BLISS O.	
Wilcox, respondent and cross-libellant.	

The libellants will take notice, that on Saturday, the 12th day of April, A. D. 1873, the above-named respondent and cross-libellant will take the depositions of John French, to be used as evidence on the trial of the above entitled cause, at the office of Charles Dressler, No. 63 Central Union Block, in the city of Chicago, county of Cook, and State of Illinois, between the hours of 8 o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

PRENTISS AND VARCE,
Attorneys for Respondent and Cross-Libellant.

We acknowledge service of the above notice by copy this 8th day of April, 1873.

WILLEY, TERRELL AND SHERMAN,
Proctors for Libellants.

205 In the district court of the United States for the northern district of Illinois.

WM. G. WINSLOW	}	In admiralty.
<i>vs.</i>		
SCHOONER S. S. OSBORN.		

Depositions of John French, taken on behalf of the before
Chas. L. Driesslien, United States commissioner, on April 18th, 1873,
at the office of Rae and Michell, in the city of Chicago. Present, Robert
Rae proctor for , and Mr. Sherman proctor for .

Said witness being first duly sworn, testified as follows:

Deposition of Captain John French.

Examined by Mr. RAE.

Q. What is your name?

A. John French.

Q. Captain, where do you reside?

A. I reside in Baltimore, State of Maryland.

Q. What is your business?

A. Captain of a vessel.

Q. How long have you been a sailor, captain?

A. Fourteen years.

Q. How long have you been a master on the lakes?

A. A master on the lakes? Been a master one season, and what you call a passage the year before that.

Q. Was you master on the seaboard?

REC. 243—7

A. No, sir.

Q. What capacity?

A. Well, last four or five years in the capacity of mate, second mate, and mate.

206 Q. What vessel were you on on the 9th of August last?

A. Schooner Philo Scovill.

Q. Where was she about twelve o'clock at night that day?

A. On the ninth?

Q. Yes.

A. About two or three miles to the southward and westward of the South Manitou Island, on Lake Michigan.

Q. Captain, do you know what way the wind was—in what direction?

A. As near as I can judge the wind was about north by east—the way I had the wind.

Q. What opportunities had you for knowing?

A. Well, we noticed by the compass frequently, and moreover our course, after we got by that island was about south by west. I could not steer any better than southwest by south and southwest, varying very little—a point or so.

Q. Were you on deck at that hour?

A. Yes, sir.

Q. How long had you been on deck?

A. I didn't go below until about two o'clock. I had been on deck all night.

Q. What kind of weather was it?

A. The fore part of the night been very squally—in the afternoon from about four o'clock until about ten; wind baffling until about ten.

Q. Any fog?

A. It looked kind of dark. I had some rain.

Q. How was the wind, steady or baffling?

A. From ten to twelve steady, baffling about one point or so.

207 Q. Were there any headlands at or near where you went which would have a tendency to change the course of the wind near shore?

A. Well, no, sir; not the way we had the wind. If the wind had been off the land they might have said so. The wind from the northward and eastward was off the lake. The nearest land to me then, astern of me, was what we call the South and North Fox.

Q. That's to windward of you?

A. Yes; that's to windward.

Q. How far to windward?

A. Probably about twenty miles or so—somewheres in that neighborhood.

Q. When the wind blows landward—towards land—does it make any difference when near land in the course of the wind?

A. Well, yes, sir; sometimes it does. I have always had it in my experience on the lakes, and any alteration in the direction of it, sometimes heavy and sometimes light.

Q. When it blows off the land does it change the wind?

A. There is no shift to it much. We have it sometimes light and sometimes heavy, but we have it in the same direction, from what experience I have seen.

Q. How was this wind; was it a top wind, or wind all over, from top to bottom?

A. I call it a steady wind—as much up aloft as there was down below.

Q. Didn't notice any current of air aloft different from that on deck?

A. No, sir.

208

Cross-examination by Mr. SHERMAN:

Q. Where do you live, captain, now?

A. My place of residence is in Baltimore, State of Maryland. I have been in Chicago all winter.

Q. Whereabouts in Chicago do you live?

A. I live on board the vessel all winter.

Q. What vessel?

A. Philo Scoville.

Q. Who were on board that vessel last August?

A. I have to study, I had so many.

Q. At the time?

A. I was captain of her.

Q. You were master?

A. Yes, sir.

Q. Who was your mates or mate?

A. As near as I can judge, let's see—when was it, in August? I have had eight or nine mates, and could not tell at present; but if you require I will go on board and look at the dates of payment as I made them.

Q. How many seamen had you?

A. Six seamen.

Q. What were their names?

A. I cannot tell you that either, sir.

Q. Can't you name any of them?

A. Not of that month. I can refer to my books.

Q. Can you name any seaman that has sailed with you during the last season?

A. I can name several. Generally discharged them every trip. Fitz Anson, Peter Miller, Peter Norman; that's about all the sailors I can name.

209 Q. Do you know where any one of them are living now?

A. No, sir.

Q. Can you name any one of your mates?

A. I had last season? Oh, yes, I can name several of them—Daniel Robinson.

Q. Where is he?

A. In Buffalo.

Q. That's one.

A. Langnan McFadden. He is in Milwaukee, I believe, and George Harper, James Ligan—as near as I can judge his name is James. His name is Ligan any way. Archibald Stevens.

Q. Where does he live?

A. Buffalo. There is one Louis Guthrie was second mate; George Mays, second mate, Chicago here.

Q. How many vessels did you sail on last season?

A. Only one, sir.

Q. That was the Philo Scoville?

A. Yes, sir.

Q. Were you master during the whole season?

A. Yes, during the whole season.

Q. How many vessels did you sail on the season previous?

A. I sailed her one passage the fall of last season during the death of the captain. Previous to that I was mate that year; then I was one year absent out of her; mate on the bark Favorite. Then previous to that again I was mate of the same Philo Scoville about three years; makes about seven all told, I guess.

Q. And during those seven years you have been sailing on the lakes?

210 A. Yes, sir.

Q. I understood you to say you had been sailing fourteen years. Where were these other years passed?

A. At sea, as near as I can judge these fourteen.

Q. On what voyage were you bound last August at the time of this collision?

A. From Buffalo to Chicago.

Q. And with what sort of a cargo?

A. To Chicago with coal.

Q. And where did you state you were the night of the 9th of August?

A. At twelve o'clock I was about three miles—two or three miles—to the southward and westward of South Manitou Island.

Q. How far were you from Beaver Island at twelve o'clock the night—the ninth of August?

A. Let's see. I was probably two or three miles over thirty-five miles from that. Generally called about 35 miles from these islands to Beaver Island.

Q. Bound up?

A. Bound up.

Q. What course were you steering that night?

A. I was steering from southwest to about southwest by south. I could not steer any better.

Q. By the compass?

A. By the compass.

Q. You stated the night was—you may state what sort of a night it was.

A. Well, it is what we call a squally night up to about ten o'clock.

Q. Was there any rain?

211 A. Yes; sir.

Q. Up to what time?

A. The most rain was about four to five o'clock, and it was showers occasionally up to about nine.

Q. And from that time on how was it?

A. Could not call it really fine weather until from 10 to 12.

Q. Were the stars shining?

A. From ten to twelve all stars was not out, but stars seen occasionally—what we call a fair night.

Q. How far could you see a vessel about twelve o'clock from the deck of your ship-vessel?

A. Depends altogether upon what kind of a light you had. Could see a good light at least 8 or 10 miles.

Q. How far could you see a vessel's sails, that was sailing without any light, opposite to you?

A. Just sailing along?

Q. Yes.

A. Couple or three miles.

Q. How far could you see a vessel sailing ahead of you?

A. About the same distance. There ain't any difference sailing head on no more than there is a beam, without she shows her lights.

Q. In what direction was the sea running that night?

A. Well, up to about ten o'clock the sea was—

Q. About from ten to twelve?

A. Say up to about ten from the northwest; kept running from the northwestward as the wind canted.

Q. Up to ten o'clock it was running from the west?

A. Call it about west or west-northwest.

Q. And from that time on how was it running?

212 A. There is one thing about it: the wind from the westward and northwest, as the wind goes to the north, of course it varies. It was squally running from the north, probably about ten o'clock; the sea was well from the northwest.

Q. How far off the land were you at twelve o'clock that night?

A. About three miles, I guess; between two and three miles.

Q. In what direction from the land in reference to the wind?

A. About southwest.

Q. I mean with reference to the wind.

A. The wind was about north by east, as near as I can tell you.

Q. What do you call that—to windward of the land?

A. No; wind was astern a little. We were to the leeward of it. The wind was blowing after the vessel. Of course you want to get to the windward. You got to haul by the wind.

Q. Now, what time did you get on deck that night?

A. I hadn't been below at all from the night before until two o'clock that morning. I was on deck all day and all night up to two o'clock.

Q. Did you note the course of the wind at the various hours of the night?

A. Well, not really particularly, unless the wind canted considerable; however, the wind came out in squalls at four o'clock to the westward, and kept to the westward for a spell, and then went about to the west-northwest, and then northwest, and when I got to the Mentou Islands, the wind canted to the northward.

213 Q. About what time did the wind turn from the west around to the north?

A. It commenced, I suppose, about eight o'clock; it commenced gradually.

Q. About what time did it reach the northwest?

A. About between nine and ten o'clock, as near as I can judge.

Q. How long before you found it in the north?

A. It was probably about half-past ten, I judge; between half past ten and eleven o'clock, as near as I can judge.

Q. What tends to fix the direction of the wind in your mind so accurately, captain, upon any one particular night six or eight months ago?

A. It h'aint been fixed in my mind that night more than any other night. A master of a vessel in a case like that coming by this land is generally keeping a watch of it.

Q. Did you keep a log?

A. I did not; if I had I could give you the exact direction; that's as near as my judgment can give it.

Q. There is then nothing by which you fix the direction of the wind in your mind except your general recollection?

A. Yes, sir; there is in one respect. When we get by the Minton Islands our course is south by west for Chicago, then we are clear of

land. We have two hundred and twenty-one miles clear of land to run for Chicago, and in these fore-and-aft vessels any kind of a night that is blowing fresh we generally keep the booms on one side in order for the safety of the vessel, and sometimes haul her up a couple of
 214 points in order to keep the sails drawing; so therefore I could not steer my course. I could not make any better than southwest and southwest by south course.

Q. How often did you pass this point coming up last season?

A. Passed it every trip. I made five trips and a half. Was in Buffalo two months.

Q. Are you able to state the direction and course of the wind every instance you passed there?

A. I don't believe there is a captain on the lakes can do that unless he keeps a perfect log. I'll bet a million of dollars there is not a captain on the lakes that can state that unless he keeps a log. It don't amount to anything unless we have trouble.

Q. Have you talked this matter over with anybody?

A. No, sir.

Q. Within the last two weeks?

A. Have heard some few men speaking something about it, but nothing of importance.

Q. Who have you heard speak about it?

A. I have heard Captain Seamans make some remarks about it.

Q. Who asked you to come here?

A. Captain Seamans.

Q. Had you any conversation with him in reference to the direction of the wind on this night any time previous to this examination?

A. He asked me how I had the wind. I told him exactly how I had it, as near as I can judge, just as I stated it here.

JOHN FRENCH.

215 UNITED STATES OF AMERICA,
Northern District of Illinois:

I, Chas. L. Driesslein, a United States commissioner in and for said district, residing in Chicago, do hereby certify that John French, the witness mentioned in the foregoing deposition, appeared before me and gave his testimony in the case of Winslow vs. Schooner S. S. Osborn, pending in the United States district court for the northern district of Ohio, in admiralty, on the 18th day of April, 1873; that previous to the examination of the said John French as a witness in said case, he was duly sworn by me as such commissioner to testify the truth in relation to the matters in controversy in said cause; that said deposition was taken upon oral interrogatories before me at the office of Messrs. Rae and Mitchell, in said city of Chicago, on said 18th day of April, A. D. 1873; that I reduced to writing the interrogatories propounded to the said witness and his answer thereto, in the order in which the same were proposed and answered, and that after said deposition was so taken by me as aforesaid, the interrogatories and answers thereto were read over by said witness, who thereupon signed and swore to the same, the oath being administered by me as such U. S. commissioner.

Witness my hand at Chicago this 27th day of January, A. D. 1874.

CHAS. L. DRIESSLEIN,
U. S. Commissioner, Northern District of Illinois.

216 U. S. district court within and for the northern district of Ohio.

W. G. WINSLOW and HEZEKIAH J. WINSLOW, }
libellants,
against
THE SCHOONER S. S. OSBORN. }

The will take notice that on Tuesday, the 8th day of July, A. D. 1873, the above named respondent will take the depositions of Captain Wm. Seamens and W. W. Seamens, sundry witnesses to be used as evidence on the trial of the above-entitled cause, at the office of Prentiss and Varce, No. 4 Rouse Block, in the city of Cleveland, county of Cuyahoga, and State of Ohio, between the hours of 9 o'clock a. m. and 6 o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

PRENTISS AND VARCE,
Attorneys for Respondent.

I acknowledge service of the above notice by copy this 7th day of July, 1873, and waive exception as to time.

WILLEY, TERRELL AND SHERMAN,
Att'ys for Plaintiff.

217

Caption.

Depositions taken before me, George D. Hinsdale, notary public, within and for the county of Cuyahoga, in the State of Ohio, pursuant to the annexed notice, at the time and place therein specified, to be read in evidence on behalf of respondent in an action pending in the United States district court within and for the northern district of Ohio, in which W. G. Winslow and Hezekiah J. Winslow are libellants, and the schooner S. S. Osborn is respondent. Present, Henry L. Terrell on behalf of the libellants, and Prentiss and Varce on behalf of the respondent.

WILLIAM SEAMANS, of lawful age, being by me first duly sworn as hereto certified, deposes and says as follows:

1st question (by L. PRENTISS). State your name, age, occupation, and place of residence.

A. My name is William Seamans; I am forty-eight years of age; I am a sailor by occupation; and I reside in Geneva, Ohio.

Q. 2. Where and in what capacity were you employed during the month of August, 1872?

A. I was captain of the S. S. Osborn for the whole season of 1872, and am still captain of the Osborn.

Q. 3. Where was the schooner Osborn on or about the 9th day of August last, at the time of the collision with the schooner American Union, and under what circumstances did the said collision occur? Please state all you know about it.

A. We were bound from Escanaba to Erie with iron ore. I
218 forget the hour we left Escanaba. The wind was variable and light, southwest, principally. About five o'clock we had a squall, wind north by northwest. Had wind fresh about an hour. It died away to about a seven or eight knot breeze. It had got to be quite

steady. Went through Poverty Passage about six o'clock. We shaped our course east after we got past Poverty Island. In about half an hour after this the wind commenced hauling ahead, to the northward. I told the man at the wheel to let her come up east by north. We hauled aft our sheets. At seven o'clock we called our men forward and got our sheets flat aft. We continued on that course until we saw Fox light. I thought we were a little to leeward, and told the man at the wheel to see if she wouldn't come a little higher. I told him to let her come up all she would. She come east by north, half north; she headed at that till we made the Beaver light. That was just before eleven o'clock; just on our weather bow, at eleven o'clock the man at the wheel said he could see the light. I told my son that I would go below, and call me at twelve o'clock. I didn't go into the cabin to lay down until twenty minutes past eleven. We had port tacks aboard from seven o'clock until I went below. We were sailing by the wind, and had been doing so from seven o'clock to that time. The wind was to the eastward of north; at all events the wind was east of north; the wind was over our port bow about five points. The course of the wind had been very steady from seven o'clock till this time. My son, Wm. Wesley, was mate, and I left him on deck in charge. Peter Leib, I think, was at the wheel. James O'Neill and Peter Bondy were also on deck; 219 that is my recollection. We had a red and a green light; good ones; green light was on starboard bow, and red light on port bow, in good position and all right. It was a very dark night, misty and cloudy, till about eleven o'clock, or until I turned in. I heard my son sing out "Hard up" and then "Hard down." I went immediately on deck. I could just see a vessel under our bows. Our jib-boom and bow-sprit was gone when I went on deck. Our foremast went after I went on deck. The American Union appeared to be crossing our bows, pretty nearly head on. It shoved the Union, she being light, around so that her bows were a little off our port bow, and then she came along our port side, port sides together. The captain of the Union, or some one on her, sang out "What vessel is that?" Some one on the Osborn replied, "The Osborn." "For God's sake, Seamaus," says he, "is that you?" I took it to be the captain of the Union. He said, "Take a line." He then threw a line to me and I made it fast to our timber-head. I turned to get the women off the Osborn on to the Union. This same voice came to my assistance and proved to be the captain of the Union. I supposed it to be him all the time. I told the men to try the pumps. They tried them and found they were not leaking. Captain Parsons came to me and told me that our lights were put out wrong—that his mate had found our green light on our port bow. I told him I guessed not. "We will go and see the men who put 220 them out." Went to the man who put the green light out; first asked him which light he put out. He said he put the green light out. Which bow he put it out on? He said he put it on the starboard bow. Captain Parsons says, "I guess you are mistaken." He said he couldn't be mistaken; that they were the patent lights and you couldn't get them out wrong. Captain Parsons said, "Oh, that's so, is it?" Before we had this conversation about the lights, I took Captain Parsons to the compass to show him how the wind was; says I, "You can see now that the wind is east of north." While we were talking about the lights the stars came out. Now, says I, showing him the north star, "There is a little fellow that can't lie, we'll come right here and get the star to range with your fly; now you see that the wind is east of north." Our attention was then turned to get-

ting his anchor clear of our head-gear. He said he was afraid we would fetch upon the North Fox, but he says, "My small anchor is all right." So he came aboard the Osborn and examined our chart—the chart of the Osborn—to see what kind of holding-ground it was under the North Fox. We went clear of it about a mile. The Union had small lights, probably giving as good light as they were made to give. They were placed on the main-rail, just forward and close to the mizzen rigging, just below the monkey-rail. We measured it, and there was six feet four inches more beam than where the lights were placed. It was just before twelve o'clock by our time when the collision occurred, and were about two to three miles from Beaver light. The wind was the same at the time of the collision as it was when I went below.

221 Sheets flat aft. The Beaver light bore east northeast. The lights of the Union could not be seen from our vessel when coming dead ahead of us. The night was very dark at the time of the collision. The main boom fell out as far as the sheets would allow, fell six feet from the starboard corner of the cabin and nine feet from the monkey-rail. The vessel drifted pretty much right off before the wind. We got no shift of wind till after daylight. We drifted off South Fox light, about four miles off from light as near as I could calculate. The injuries to the Osborn were as follows: It carried away our bowsprit, 'night-heads, port bow was gone back as far as abaft the cat-head down to the plank-sheer; jib-boom, foremast, forecastle, was all torn to pieces; windlass irons all broken; square-sail yard forestays were broken and carried away; starboard bow was torn away as far back as the cat-head; mizzen boom fell across the skylight about a foot from midships, near the wheel.

Q. 4. What was the shape and condition of the sails of the American Union at the time you came on deck, and what sails was she carrying?

A. I could not say how her canvas was trimmed exactly, but her sheets looked to be well off. She was carrying whole foresail, forestay-sail, two jibs, and a single reefed mainsail. I did not see any mizzen on her; don't think there was any.

Q. 5. Did Captain Parsons ask you, immediately after the collision, if you could see the lights on the American Union, and did you say you could?

A. He did not ask me any such question, nor did I tell him I
222 did see them, nor did I tell Captains Parsons I could see them from the quarter of the Osborn.

Q. 6. How long was the Osborn detained for repairs, and where were the repairs done?

A. Repaired in Cleveland, and detained about six weeks. I cannot tell exact time of delay without referring to books.

Cross-examination:

Q. 7. Is the Poverty Island passage to the north'ard or south'ard of the Rock Island passage?

A. North'ard.

Q. 8. What is the course by chart from Rock Island passage past Beaver Island?

A. East three-quarters north by chart. From Poverty Island passage about east $\frac{1}{4}$ north.

Q. 9. What time of night was it when you say you judged you were a little too far to leeward?

A. I did not look at the time, but think it was about half-past ten.

Q. 10. Who went to wheel at ten o'clock?

A. I think it was Peter Leib. He was at wheel when I went below, and should have remained there till 12, when watch was changed.

Q. 11. Who gave him his orders when he went to the wheel?

A. I don't remember.

Q. 12. Who was at wheel before Leib, and what time did he go to the wheel?

A. I think it was James O'Neill. He went to wheel at eight o'clock. Don't remember who gave him his orders.

Q. 13. When a vessel is sailing full and by the wind, do you say that she is sailing a course?

A. Yes; frequently have a course when sailing full and by.

223 Q. 14. When you want a vessel to sail full and by the wind, what is the order to the man at the wheel? Is a course given him, or is the order to keep her full and by?

A. If the vessel can make her course sailing full and by, you would tell him to keep her there.

Q. 15. How much water does your vessel draw, light?

A. In the neighborhood of six and a half feet.

Q. 16. How much did your vessel draw that night?

A. About 13 feet; don't know exactly.

Q. 17. Does the vessel sail faster light or loaded?

A. She will sail faster light. Think we had not less than a thousand tons of ore on.

Q. 18. Does the vessel sail faster before or by the wind?

A. Some vessels one way and some another.

Q. 19. From seven to twelve that night, how much of a breeze was there?

A. About seven or eight knots.

Redirect examination:

Q. 20. What orders were given by you to the men at the wheel that night?

A. No orders till we made Fox Island light on our port bow. Orders then given by me to Peter Leib to keep her east by north half north.

WILLIAM SEAMENS.

WILLIAM W. SEAMENS, of lawful age, being by me first duly sworn, deposes and says as follows:

Q. 1st. State your name, age, occupation, and place of residence.

A. My name is William W. Seamens; am twenty years of age; am a sailor; reside at Geneva, Ohio.

Q. 2. Where and in what capacity were you employed during the season of navigation in 1872?

224 A. Was employed on the schooner Osborn, as mate, during the season of 1872.

Q. 3. Please state all you know about the collision between the schooner Osborn and the schooner American Union on the night of August ninth, 1872.

A. I went on deck about eight o'clock in the evening. The vessel at that time was going east by north, and until we made the Fox light the wind was about north by east; sheets flat aft. She was close-hauled by the wind, the sheets were flat aft, till collision. The only change made in bearing of the vessel up to collision was in letting her come up a half a point when we made Fox Island light. The wind remained same direction up to time of collision. The wind remained steady. I

remained on deck till after collision. Peter Leib was at the *vessel* from ten to twelve. Peter Bondy was on the lookout at that time. I was all around the deck, looking out for everything. Peter Bondy stood on the gallant forecastle. It was a very dark, cloudy night. Our lights were in their places and burning, the green light on starboard bow and red light on port bow. Made Beaver Island light about eleven o'clock. Leib remained at the wheel till time of collision, but Bondy was not on the lookout till that time. I went up on to the top-gallant forecastle and looked all around for lights, and made sure that he was on the lookout. I told him we could see no lights. I told him we would go and pump her out. We went aft to the pumps

and had just got hold ready to pump when James O'Neil said,
 225 "What's that?" We all jumped right to leeward, and right ahead we saw a light. I sang out "hard up," and then "hard down." The words were hardly out of my mouth when she struck us. I couldn't tell whether the light I saw was one of those on the side of the vessel or in her cabin—just caught a glimpse of her. She struck us very nearly dead ahead. She tore everything down forward; took away foremast and bowsprit jib-boom. The main boom fell on the cabin about six feet from the starboard corner. O'Neill was just to leeward of the main boom near the pump, facing forward. I guess I was facing forward when I got to the pump—couldn't tell which way Bondy was facing. There was nothing on our vessel to intercept our view from where we stood. It was probably between one and three minutes from the time Bondy and I left the lookout to the time when we first saw the Union coming into us. I walked back moderately—immediately faced about when we reached the pump; I think we had taken two or three strokes when O'Neill cried out. I noticed where the lights of the American Union were carried, it was just forward of the mizzen rigging. Upon the supposition that the Union was approaching dead ahead, her lights could not have been seen from the deck of the Osborn. I could not tell whether the light we saw at the moment of the collision was one of her side-lights or a light in her cabin. The Union came along our port side after collision. I did not hear any of the conversation between the two captains. Bondy was on the lookout all the
 226 time from ten o'clock to the time of the collision, excepting when we went forward to the pumps.

Cross-examination:

Q. 4. What orders did you give the man who went to the wheel at eight o'clock when you went on deck?

A. I did not give him any orders.

Q. 5. What orders did you give to the man who went to the wheel at ten o'clock?

A. I did not give him any orders.

Q. 6. Who was in charge of the watch from eight to twelve?

A. I was.

Q. 7. When you were at the pump, which side of the mainsail was you on?

A. Very nearly directly under it—directly to windward.

Q. 8. Which side of it was Bondy?

A. The same side I was; that is, the windward.

Q. 9. Which side was O'Neill?

A. The leeward side. I think we were all hold of the brakes.

Q. 10. How high above deck is your main boom?

A. At the aft end it swings above the cabin about ten feet from the

deck, and forward about four or five feet; the main boom is sixty-six feet long.

Q. 11. How far aft of the mainmast is the pump ?

A. Twenty-five or thirty feet.

Q. 12. How do you know the wind was north by east ?

A. By the way the canvas was trimmed.

Q. 13. Did you look at the compass ?

A. Yes, sir, repeatedly.

Q. 14. Then why didn't you know by compass which way the wind was ?

227 A. I would if I had taken notice; I know just how many points she will work in eleven points.

Q. 15. Could she sail faster before or by the wind ?

A. She could sail faster before the wind.

Q. 16. Which bow did you see the Union over ?

A. Very nearly dead ahead. She might have been just a little on our starboard bow.

Q. 17. Did you see one or both of her lights ?

A. I see just one light.

Q. 18. What was the color of it ?

A. Don't know; didn't have time to see.

Q. 19. Don't you know whether it was a bright light or colored light ?

A. I don't know.

Q. 20. Was your starboard side injured any ?

A. No, sir; it was not.

Redirect examination :

Q. 21. What was the condition of the sails of the American Union at the time of the collision ? What shape were they in ?

A. Didn't notice how her sails were trimmed at the time of the collision. Between five and ten minutes after the collision, I noticed her mizzen was taken in; her fore gaff-topsail was set.

W. W. SEAMENS.

THE STATE OF OHIO,

Cuyahoga County, ss :

I, George D. Hinsdale, a notary public in and for the county and State aforesaid, duly commissioned and qualified, do hereby certify that the above-named Captain Wm. Seamens and W. W. Seamens

228 were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them respectively subscribed as above set forth were reduced to writing by me in the presence of the witnesses respectively, and were subscribed by the said witnesses in my presence, and were taken at the time and place in the annexed notice specified.

I do further certify that I am not of council, attorney, or relative of either party, or otherwise interested in the event of this suit.

In witness whereof I have hereunto set my hand and seal of office this 10th day of July, A. D. 1873.

[SEAL.]

GEORGE D. HINSDALE,
Notary Public.

District court of the United States within and for the northern district of Ohio.

THE STATE OF OHIO,
Northern District, ss:

W. G. WINSLOW AND OTHERS, LIBELLANTS,
against
THE SCHOONER S. S. OSBORN ET AL., RESPOND-
ent and cross-libellant.

The libellants will take notice that on Wednesday the first day of March, A. D. 1876, the above-named respondent and cross libellant will take the depositions of William Cary sundry witnesses to
229 be used as evidence on the trial of the above-entitled cause at the office of Rae and Mitchell, 20 Major Block, in the city of Chicago, county of Cook and State of Illinois, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day between the same hours until they are completed.

PRENTISS AND VARCE,
Proctors for Respondents.

I acknowledge service of the above notice, by copy, this 25th day of February, 1876.

WILLEY, TERRELL AND SHERMAN,
Proctors for Libellants.

District court of the United States within and for the northern district of Ohio.

WM. G. WINSLOW AND OTHERS, LIBELLANTS,
against
THE SCHOONER S. S. OSBORN ET AL., RE- } In admiralty.
spondent and cross-libellant.

Deposition of Wm. Carey, taken on behalf of the respondent, in pursuance of the annexed notice, before Wm. L. Mitchell, a notary public in and for the city of Chicago, county of Cook and State of Illinois, on the first day of March, 1876, at the office of Rae and Mitchell, in the city of Chicago. Present, Mr. Baldwin, for libellants, and Mr. Condon, proctor for respondents.

Said witness, being first duly sworn, testified as follows:

230 WILLIAM CAREY:

Q. 1. What is your name, age, residence, and occupation?

A. My name is William Carey; am forty-nine years of age; reside in Chicago; am harbor-master at Chicago.

Q. 2. Do you know the parties to this suit or either of them?

A. I know Mr. Winslow.

Q. 3. Do you know the schooner American Union?

A. Yes, sir.

Q. 4. Have you been a master of vessels on the lakes; if so, how long?

A. I have been a master of vessels on the lakes for about eighteen years.

Q. 5. Did you know Captain Wm. Bain, of Buffalo, and late of the schooner Onondago; if so, how long have you known him?

A. About twenty-five years. Yes, sir.

Q. 6. Did you ever examine the schooner American Union with said Bain, for the purpose of ascertaining the visibility of her lights; if so, when and where?

A. Yes. In Illinois Central slip, in Chicago. It is called C slip. It was about the middle of November, 1874.

Q. 7. At whose request was said examination made by you; in behalf of the American Union, or in behalf of the Osborn?

A. I was requested by John Prindeville to go and look at those lights. I do not know in whose behalf I went. I don't think anything was said about it.

Q. 8. From what place, or at what height above the water, if any, was this examination of the lights from ahead of the vessel? Describe fully how you examined them, in your own way.

231 A. I went down to the slip to examine those lights I saw. The first I see the red light from abreast of the vessel; we considered it a good light. I went directly ahead of the vessel; I could see the red light, but not the green light, for the reasons that there were obstructions between me and the green light, piles of coal and lumber on the dock which obstructed the view. I then remarked the vessel was not in a proper position to see their lights. That is about all I know about the matter. I then gave it up.

Q. 9. Where were her lights then placed, and about what distance ahead of her did you stand, when you say you saw her lights as you have last described?

A. The lights were placed either on the main-rail or monkey-rail, abreast of the mizzen rigging. I was about three or four hundred feet ahead of her.

Q. 10. Was Captain Bain standing there with you at that time, and did you stand dead ahead of the vessel?

A. Captain Bain and Mr. Prindiville went closer to the vessel, to those obstructions—the coal pieces. I am of the impression they went on the top of those piles. I did not go, and have said I gave it up when I saw the obstructions. I am most positive they went up there. Bain did, anyway.

Q. 11. About how much was the top of that or those coal piles above the deck of the vessel, if any?

A. It must have been eight or ten feet higher than the deck of the vessel.

Q. 12. When you viewed the vessel from ahead, as you have stated, did you stand in a line, or above or below the level of the deck of the vessel?

A. I should judge I was below the level of the deck of the vessel about two or three feet.

232 Q. 13. Is there any difference in the width of that vessel at the mizzen rigging and at her fore rigging or at midships; if yea, what is that difference?

A. There is a difference between midships and the mizzen rigging. I don't know as there is any difference as to the width at the fore rigging and the mizzen rigging. It is two-and-a-half or three feet wider at midships than at the mizzen rigging. When I say midships I mean the middle part of the vessel.

Q. 14. What difference, if any, is there in the width of this vessel between that at the after part of her fore rigging and the forepart of

her mizzen rigging, and where, in your opinion, is the widest part of this vessel located?

A. About two feet. The widest part is about half-way between the fore rigging and the main rigging.

Q. 15. Did you ever sail the schooner American Union, as master; if yea, when and how long?

A. I sailed her the season of 1866.

Q. 16. About what is the height of her rail at the mizzen rigging above water when light?

A. Between fourteen and fifteen feet.

Q. 17. About what is its height when light at her fore rigging?

A. Between fifteen and sixteen feet.

Q. 18. Where were the lights of the vessel carried on her when you sailed her?

(Objected to.)

A. I carried them on the monkey-rail abreast of the mizzen rigging until such time as there was a fore-castle built *built* on deck, then I carried them on the fore-castle.

233 Cross-examination by Mr. BALDWIN:

X Q. 1. Which made the most careful and thorough examination of the lights at the time you have spoken of, yourself or Captain Bain?

A. I think Captain Bain did.

Q. 2. He continued his examination after you gave it up, did he?

A. Yes, he did.

Q. 3. Which side of the vessel was the red light on?

A. I think it was on the starboard side.

Q. 4. Did you go around abreast the vessel on the other side?

A. No, sir.

Q. 5. Were the lights directly abreast the mizzen rigging, or might they not have been a little forward of the mizzen rigging?

A. The lights were abreast of the forward part of the mizzen rigging.

Q. 6. When you went ahead of the vessel and saw the red light of vessel, you stood on the dock, did you?

A. I want to correct. I am of the impression it was the red light I saw, but I am not sure I am sure it was on the starboard side, the light I saw; I stood on the dock when I saw the light.

Q. 7. If the green light had been in the same position on the other side that the red light was, would there have been any difficulty in seeing it when standing ahead of the vessel, if it were not for the obstructions on the dock?

(Objected to as incompetent, being a mere supposition.)

A. I think not.

234 Q. 8. Do you remember what Captain Bain climbed upon?

A. I think it was a coal pile.

Q. 9. How high was it above the deck?

A. Fourteen or fifteen feet.

Q. 10. How much ground did it cover?

A. I presume about fifty feet square.

Q. 11. How far from the vessel was it?

A. About three hundred feet.

Q. 12. Didn't Bain go about to take observations from various points on the dock, more so than you did?

A. Yes, sir.

Q. 13. Did Captain Prindiville go about with him, do you recollect?
(Objected to as immaterial.)

A. Yes.

Q. 14. You did not make any measurements to ascertain the precise location of the lights, or the vessels dimensions, did you?

A. I did not; there was no measurements made that night.

Q. 15. Where was this forecandle you have spoken of?

A. Right aft of the foremast on deck.

Redirect examination:

Q. 19. Were there any points or places about on a level with the deck of that vessel, and about three hundred feet ahead of her, from which you could test the visibility of her lights at that time?

A. There was to test the starboard light, but not the port light.

Q. 20. Why didn't you test their visibility by standing on that coal pile?

235 (Objected to.)

A. Well, when I found those obstructions ahead of the vessel, I gave the matter up.

Q. 21. Did you or did you not consider that observations taken on that coal pile were a fair test of the visibility of her lights from a point on a level with her decks, say three or four hundred feet ahead of her?

A. No.

Q. 22. You have stated on cross-examination, in substance, that when you saw the light on the starboard side of this vessel, that if there had been no obstructions you think you could have seen the other light. By that answer do you wish to be understood as stating positively that it could be seen at that point if said obstructions were removed?

A. I did not state positively. I believe I could; I am not positive on that.

Cross-examination:

X Q. 16. I understand you mean that you are not positive you could have seen the light, but you believe you could if it had not been obstructed. Is that what you mean?

A. Yes.

Q. 17. May there not have been points on that pile of coal, or on the lumber or other obstructions on the dock, but little if any above the level of the vessel's deck?

(Objected to as immaterial.)

A. There might have been.

W. M. CAREY.

Sworn and subscribed to this 1st day of March, A. D. 1876, before me.

[SEAL.]

WM. L. MITCHELL,
Notary Public.

236 STATE OF ILLINOIS,
Cook County, ss:

I, Wm. L. Mitchell, a notary public in and for the city of Chicago, county of Cook and State of Illinois, do hereby certify that Wm. Carey, the witness mentioned in the foregoing deposition, appeared before me, on the first day of March, 1876, at the office of Rae and Mitchell, in the city of Chicago, to give his testimony in the case of W. G. Winslow et al., libellants, against The Schooner S. S. Osborn et al., respondents and cross-libellants, now pending in the United States

district court for the northern district of Ohio; that previous to the examination of the above-named person as witness in said cause, he was sworn by me, as such notary public, to testify to the truth, the whole truth, and nothing but the truth in relation to the matters in controversy in said cause; that said deposition was taken upon oral interrogatories; that I reduced to writing the interrogatories propounded to the said witness, and his answers thereto, in the order in which the same were proposed and answered.

Witness my hand and seal at Chicago, this first day of March, A. D. 1876.

WM. L. MITCHELL,
*Notary Public in and for the City of Chicago,
County of Cook and State of Illinois.*

237. In the district court of the United States for the northern district of Ohio.

THE STATE OF OHIO,
Cuyahoga County, ss:

WILLIAM G. WINSLOW ET AL., LIBELLANTS,	} Depositions taken by agreement.
<i>against</i>	
THE SCHOONER S. S. OSBORN (B. O. WILCOX claimant), respondent.	

The said libellants will take notice that on Friday, the 17th day of March, A. D. 1876, the above-named respondent will take the depositions of , sundry witnesses to be used as evidence on the trial of the above-entitled cause, at the office of Prentiss and Varce, in the city of Cleveland, county of Cuyahoga and State of Ohio, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day between the same hours until they are completed.

Caption.

Depositions taken before me, John Biggs, a notary public within and for the county of Cuyahoga, in the State of Ohio, pursuant to agreement, at the time and place therein specified, to be read in evidence, on behalf of the respondent, in an action pending in the district court of the United States for the northern district of Ohio, in which Wm. G. Winslow and Hezekiah J. Winslow are libellants, and The Schooner S. S. Osborne (B. O. Wilcox, claimant) is respondent. Present, H. L. Terrell, on behalf of the libellants, and Wm. H. Condon, on behalf of the defendants.

WILLIAM SEAMENS, of lawful age, being first duly sworn, as hereto certified, was examined by WM. H. CONDON, and deposes as follows:

Q. 1. Captain, did you have a conversation with Alexander Stewart, mate of the barque Nelson, in the city of Cleveland, immediately after your vessel and that barque arrived here, in regard to how the barque Nelson had the wind on the night of this collision?

A. I simply asked the question how he had the wind coming over? His answer was that he had it ahead, so that he was close-hauled.

Q. 2. When and where did that conversation take place?

A. On the dock, down in the river-bed.

Q. 3. What else was said at that time, if anything?

A. Nothing; only that I told him that I wished he would remember that.

Q. 4. He has stated that after he passed Beaver light that his vessel made a northeast course, and a little before four o'clock she broke off NE. $\frac{1}{2}$ E. and the Skillagalle light then bore around on the weather-bow. Please explain whether that statement is true, or whether he could have made that course, and have the light bear as he said, or not.

A. It is impossible. The northeast course brings him close by 239 Hog Island reef, close along by the white shoals on the starboard hand coming down. The chart will show that.

Q. 5. If he hauled up on a northeast course when one or two miles Beaver Island light, would that bring him on the course that you describe, a northeast course?

A. Yes, sir; it would. Right along just by the starboard hand of these reefs.

Q. 6. If he had an east by north, or east by north one-half north course, and a mile away from Beaver light, how would that bring him with reference to Skillagalle light?

A. I have forgotten the direct course of Skillagalee, but he must make a point to windward or else he don't make his course good by a long ways. I could not tell exactly, but anybody could see very quick on the chart. It brings him clear to leeward of his course, two or three points, as near as I can recollect now; but if a man takes hold of the chart he can tell exactly. If a vessel goes on her course northeast $\frac{3}{4}$ east she will go a long way to windward.

Q. 7. So that the light would bear on his lee instead of on his weather bow?

A. Yes, sir.

Q. 8. Was there any signal of distress hoisted on the Osborn or the Union the night of the collision, or early the next morning?

A. There was a signal of distress by a propeller at the South Fox dock in the morning, after daylight.

Q. 9. Was there any change made in the position of the mainsail of the Union on that morning, early?

240 A. He jibed his mainsail over and got around on the port tack just at daylight.

Q. 10. Was the breeze at the time of the collision in a sea too strong for such a vessel as the Union to carry all her canvas?

A. No, sir; it was only a seven-knot breeze. I don't think it was too strong.

Q. 11. What canvas would a vessel like the Union carry in such a breeze and sea as there was that night if she was light and by the wind?

A. If she was wanting to get along it would be another thing; she would carry all her fore-and-aft canvas.

Q. 12. If she was sailing with the wind free, what canvas would a vessel carry with such a breeze on such a night?

A. She would be able to carry the whole of it; if she felt so disposed she could carry it.

Q. 13. What do they usually carry when having the wind free and in such a breeze as that was; I mean a "three-and-after?"

A. They generally carry the whole of it in such a breeze.

Q. 14. A vessel is by the wind in such a breeze, and she has her main-

sail single-reefed, and mizzen in, and main and mizzen gaff-topsails stowed away; what would that indicate as to how she had the wind?

A. She would have the wind free, for he could not keep his vessel by the wind with his aftersail in.

Q. 15. Is the mizzen necessary to have on with a vessel by the wind in order to keep her well under control?

A. That has been my experience; it is necessary.

Q. 16. Especially on a "three-and-after"?

241 A. Yes, sir.

Q. 17. What is the course from Sand Bay to Beaver Island light?

A. Well, from the head of the Beaver it is about S. $\frac{1}{2}$ E. It depends on whether you are off or close in. On the shore it is about S. by E., but the chart says S. $\frac{1}{4}$ E.; but that would put you well off in the bay.

Q. 18. If a vessel was sailing along the beach there from Sand Bay to Beaver Island light with the wind three points free, in what direction must the wind then be blowing?

A. It would be W. by S.; that is, if they were close in; the way the chart is, it makes a little difference; it would throw them around to the westward a little further; it would be either west or a little south of west.

Q. 19. Do you consent that the stenographer shall sign your deposition for you when transcribed?

A. Yes, sir.

Cross-examination waived.

WILLIAM SEAMENS,
Per JOHN BIGGS,
Stenographer.

S. LAMPOH, of lawful age, being by me duly sworn, as hereto certified, deposes and says as follows:

Q. 1. (By WM. H. CONDON, attorney for respondents.) What is your occupation?

A. I am a sailor.

Q. 2. How long have you sailed, and in what capacities?

A. I have sailed for about the neighborhood of 24 or 25 years, and I have been master of vessels about 12 or 13 years; I don't know within a year or a month exactly. I was mate and second mate two years.

242 Q. What vessel did you sail in August, 1872, and in what capacity?

A. I sailed the schooner Fayette Brown, as master, of Cleveland.

Q. Did you know the Osborn and American Union at that time?

A. Yes, sir; I knew both of them.

Q. How did your vessel compare in size with those?

A. She is larger than the Union, and somewhat smaller than the Osborn—not much; very nearly the same.

Q. A "three-and-after"?

A. Yes, sir.

Q. Where were you and the schooner which you sailed on the 9th of August, 1872?

A. In the morning I was in the Straits of Mackinac, and that night at dark, a little after dark, I was going into Green Bay.

Q. Did you see the schooner S. S. Osborn and the barque American Union that evening?

A. The American Union was in company with me that morning, and through the day we got away from her, and at night we lost sight of

her. The S. S. Osborn, we saw her coming out of Green Bay, about six or seven miles to the eastward of the entrance.

Q. What canvas were you carrying at that time?

A. We were carrying everything, squaresail and everything that would pull.

Q. Did you notice what the Osborn was carrying when you passed her, and how her sails were?

A. Yes, sir; she had her large sails on, and was making her small sails; when we passed her she was making her main topsail then.

Q. Did you notice how her sails were trimmed?

243 A. Not particularly; it had been raining, and we did not take notice, and was quite a piece from her. She was to the southward of us.

Q. Where were you about ten o'clock that night?

A. Really I don't know as I could remember positively. I should have to get an hour to go and come on; I was somewhere in the neighborhood of Point Peninsula light-house. It is about $12\frac{1}{2}$ miles from Escanaba to that place.

Q. Did you change your course near that point?

A. Yes, sir; we have to. If I should relate to you the course from the entrance of Green Bay to Escanaba I should bring it out better. From Beaver Island to the entrance of Green Bay you steer west $\frac{3}{4}$ south; that is the government course; and then WNW. to Point Peninsula, and then north one-half west.

Q. When you got to Point Peninsula what was your course then?

A. North one-half west.

Q. How was the wind then?

A. It was north, such as it had been all the afternoon; shortly after it shifted. It shifted in the afternoon.

Q. How was it after it shifted?

A. When it first shifted it was NW., and then kept about north till I got to Escanaba.

Q. When did you get to Escanaba?

A. It might have been a little before daylight.

Q. Where were you at 12 o'clock?

A. We were beating up to Escanaba. The mate was called then; it was his watch below until then. The mate stayed on deck and I stayed on deck with him.

Q. How long had the wind been north?

244 A. It is a pretty good while ago; it was sometime in the afternoon when the wind changed. I don't really know what time it was, but I should judge it was somewhere between four and six o'clock in the afternoon that day.

Q. How was the wind from 10 to 12 o'clock that night?

A. It had not shifted much from north during that time.

Q. If it varied any from north, in which direction was it?

A. If there was any variation it was to the eastward, for we were steering WNW. after we took the entrance of Green Bay. I did not see the Union on that afternoon. We were carrying a square-sail then.

Q. How far were you at 12 o'clock from Beaver light?

A. I should think it was 45 or 50 miles.

Q. What kind of breeze was blowing at that time?

A. It was blowing a good fresh breeze, 8 or 9 miles an hour, a good working breeze, although we were carrying all sail such as we carry by the wind. We did not carry the fore gaff-topsail, because in short work we could not shift it. I don't think we were carrying the jib topsail,

but ain't positive, because a light vessel carrying too much head-sail will pay off too much, and you cannot keep them up to the wind.

Q. If such a vessel as yours or the American Union was by the wind a few miles west of Beaver Island light that night with a seven or eight knot breeze, would she have her mizzen in, her mainsail reefed, and her main and mizzen gaff-topsail stowed; and, if not, why not?

A. I could not answer that question; it is according to how she had the wind.

Q. The same as you had the wind.

A. If the wind was three points free she would be steering W. 245 by S., and I was steering WNW., close-hauled. My own vessel won't work that way. She would have to have more after canvas than forward canvas to make her work, for she would not keep up by the wind. She would work under that canvas if the wind was free.

Q. Do not "three-and-afters" when by the wind need a mizzen on?

A. Yes, sir; but my vessel would not work that way. I don't know anything about the American Union though, but I have been on just such vessels as that, and never found one that would work by the wind without her after canvas being set, and if I shortened any I would shorten the forward canvas.

Q. If a "three-and-afters" like the American Union in size was sailing in a 7 or 8 knot breeze without her main gaff-topsail, the mizzen and mizzen-gaff topsails being stowed, what would these sails, being off her, indicate with regard to how she had the wind?

A. It would have no indication unless they were torn or split. If they were in good condition, it would indicate that the wind was free, or that she did not want to make a certain place before daylight or the passage before daylight.

Q. Why not get to the passage before daylight?

A. Because there was only one light-house there then at that time, and that is the reason, perhaps, on such a night as that was.

Q. Do you know the course from Sand Bay to Beaver Island light when within a mile or two of the beach?

A. There are two different courses. In the first place, from Sand Bay a great many men would keep off from Beaver Island. I would 246 steer south by east, and then SW. $\frac{1}{2}$ S. You have got to follow around; it is not one straight course from Sand Bay to Beaver Island light; it is a short distance one way, and then a short distance another way. Sand Bay is about from 6 to 7 miles out of the regular course to Chicago or Green Bay. Beaver Island is about at that place, $3\frac{1}{2}$ miles out of the course. Until you get to the island you have got to change your course again as you could not follow it around by steering on one course.

Q. If you were three miles off the land, how would you steer from Sand Bay to Beaver Island light?

A. From Sand Bay to the Beavers is about a direct course for five or six miles. Some steer S. by W. In having the wind free I generally steer S. by E. You go $3\frac{1}{2}$ miles, and then shape your course for Green Bay W. $\frac{3}{4}$ S.

Q. If a vessel were sailing from Sand Bay toward Beaver light, and were going south to S. by E., and had the wind 3 points free, what would you say the wind was—in what point?

A. I could not say; she could have the wind from either side 3 points free. I don't know which side she had the wind on.

Q. On the port side.

A. Well, then, it would be about north or NNE.

Q. When she was heading south, and had the wind three points free, how was the wind?

A. Well, I judge it was about west, or west by north then; that is, if she had it off the port side.

Cross-examination by Mr. TERRELL:

247 Q. Who was the owner of the Fayette Brown?

A. Alvah Bradley.

Q. Who was the mate?

A. William Price.

Q. Who was second mate?

A. I don't remember now who the second mate was, but I can refer back to the books, if you want to.

Q. Do the books show the names of the crew?

A. Yes, sir; they do.

The foregoing testimony was taken in short-hand by the notary, and signed by the witness.

STEPHEN LAMPOH.

J. H. ANDREWS, of lawful age, being first duly sworn as hereinafter certified, deposes and says as follows:

Question (by Mr. CONDON, respondent's counsel.) What is your business?

A. Seafaring life, sir.

Q. How long have you followed that business?

A. About thirty-three years, I believe.

Q. How long have you been a master of a vessel upon the lakes?

A. About twenty-five years—somewhere in that neighborhood, I believe.

Q. Do you know the American Union?

A. Yes, sir; the schooner American Union.

Q. Is it usual for such a vessel in a seven or eight knot breeze, with a light sea on when by the wind, to carry all her canvas? Can she do it?

248 A. Well, I should suppose she could carry all sail with a seven-knot breeze. That is all that will stand. In some of these "three-and-afters" the squaresail won't stand by the wind; mine won't, any way, without hauling down almost all the jibs.

Q. In such a vessel by the wind, and in a breeze of that kind, would she have her mizzen in, her mainsail single-reefed, and main and mizzen gaff-topsail stowed; and, if not, why not?

A. I never had anything to do with any ship that I could keep by the wind in that way; not very sharp up, anyhow.

Q. Have you sailed "three-and-afters" on the lakes?

A. Yes, sir; I sailed all kinds that they have here.

Q. If a "three-and-after," like the Union, was sailing in a seven or eight knot breeze without a main-gaff topsail, her mizzen and mizzen-gaff topsail stowed, and her mainsail reefed, what would those sails, being off and in that condition, indicate with regard to how she had the wind?

A. I should think, if she was going through the water and doing anything, she would have the wind free.

Q. Suppose that she was making seven or eight knots, what then?

A. She should have the wind free to do it, and a pretty good breeze, too.

Q. What is the course from Sand Bay to Beaver Island light?

A. You cannot steer one course in steering out of the bay, it is about south $\frac{1}{2}$ east or $\frac{3}{4}$, perhaps, after you get clear of the land; it depends on where you are; when you get above the first point, you have
249 to haul up to get around to the light, steer to the westward all the time if you are going across the lake there. I steer across there with a fair wind west $\frac{1}{2}$ south; that is with the wind nor'ard.

Q. If a vessel from Sand Bay bound for Beaver light was sailing S. $\frac{1}{2}$ E., and had the wind three points free, and on the port tack, in what point would the wind be?

A. She would have to have the wind from the eastward.

Q. Somewhere about east, would she?

A. Well, then, vessels would go in about six points.

Q. If she had it over the starboard side, how would the wind be?

A. She would be on the starboard tack then, and have the wind from the westward.

Q. How near west, the wind being 3 points free?

A. With this sail that you have just mentioned before and steering S. $\frac{1}{2}$ E. the wind would be a half a point abaft the beam, and that is about all she would do, too. I think under that sail she would not haul up around the island to cross over with that sail on and with that wind.

Q. How would it be if she had her mizzen on, and steering S. $\frac{1}{2}$ E. from Sand Bay, having the wind 3 points free on the starboard side?

A. She would have the wind NW. by W. $\frac{1}{2}$ W., if it was 3 points free.

Q. If she is heading south, and on the wind, it would be five points from south, would not it?

A. If she was on the wind and heading south, the wind SW. by W. would be all that she could do; and she could not do much, then, with all sail on. I never had anything to do with one that would
250 work in five points; it should be $5\frac{1}{2}$ or 6 to have them do anything, if there was any wind or sea on.

Q. If she had a 7 or 8 knot breeze and heading southwest with the wind 3 points free, how is the wind?

A. It must have been pretty well around NW. there, I should think, to do that.

Q. Well, if she was heading south and by the wind, then the wind would be 5 points from south, would not it; 5 or 6 points from south, the wind would be, would not it?

A. Yes, sir; more than that. We usually get under way from Sand Beach Bay with the wind from the nor'ard; we get under way with the after sail in, and as we get up around the island make the after sail. I do, and I have seen other vessels do the same thing. We could not get under way with the wind west without any after sail on.

Q. If you was heading south and sailed within five points of the wind, and had the wind over her starboard side 3 points free, that would give her the wind west, would it not?

A. Yes, sir.

Q. You say most of these "three-and-afters" require six points to work in?

A. I guess they do; mine does. She will do anything in fine weather, but do a good deal better with 6 points.

Q. What vessel is yours?

A. The Redington.

Q. How does she compare in size with the Union?

A. She is not quite as large. She carries 55,000 bushels of corn.

251 Cross-examination by Mr. TERRELL:

Q. When you say the vessel has the wind three points free, what do you mean?

A. 3 points from close-hauling.

Q. You call anything free, then, except close-hauling?

A. Anything is free when you check yards and haul off your sheets.

Redirect examination:

Q. If the wind was N. by E. and you started out of Sand Bay for Beaver light with a three-and-after, and wanted all her sails to draw, how would you head?

A. We would go with the booms on the starboard side, and be on the port tack, steering S. by E.

Q. Would you steer south by east if the wind was north by east, and you wanted all your canvas to draw well, or would you keep up a point or two?

A. I should haul all I could. You can steer with everything full except the jib, and the wind N. by E., coming up along the island, there.

Q. If you had the wind northeast, and had the wind coming over your starboard side, and bound down there, how would you steer so as to have all your canvas draw well, from Sand Bay to Beaver light, and having the booms on the port side?

A. I should calculate to make that course good when I got out clear of the land, and shape the course south $\frac{3}{4}$ east, or south $\frac{1}{2}$ east. Sometimes there is more deviation of the compass, there than at others; there is also variation there and local attraction, and compasses don't work alike.

252 Q. Is not it usual in three-and-afters bound south, and the wind south, to steer a couple of points from their course, so as to have all their canvas draw?

A. Yes; you cannot do anything with them to make everything pull unless you do; and a little more than a couple of points sometimes. That is the way I go with them; I go on one jib until I get far enough and then jibe over to haul up the other way.

Q. In that case they frequently scandalize the mainsail in a good many vessels?

A. They don't do it in mine; but I have been in vessels where they did that. We dropped the peak sometimes, and that is what we call scandalizing the mainsail nowadays, but men have different ideas about such things.

J. H. ANDREWS,
Per JOHN BIGGS.

The stenographic notes, of which the above is a correct transcript, were signed by the witness.

ALBERT S. OUTIS, of lawful age, being first duly sworn, was examined by Mr. CONGDON, and deposes as follows:

Q. What is your business?

A. Sailor.

Q. How long have you sailed?

A. Eight years, off and on.

Q. Do you remember the collision between the schooners Osborn and American Union, in August, 1872?

A. Yes, sir.

Q. Were you on board of either of these vessels at the time?

A. Yes, sir; on the American Union.

253 Q. What kind of lights did the American Union have at that time?

A. Red and green.

Q. How long had you sailed on her before that collision?

A. About a month. I don't know accurately as to the time.

Q. Did you ever have any trouble with those lights during that time?

A. Yes, sir; frequently the first trip, and we changed stewards; they attended to the lights, and the last steward seemed to have better luck with them than the first steward. On the first trip we had considerable trouble with the lights.

Q. Did you notice how they were at the time of the collision?

A. Yes, sir.

Q. Did you notice their condition?

A. No, sir; I don't remember.

Q. Do you remember when you left Sand Bay that night with your vessel?

A. Yes, sir.

Q. Was there any change in the wind from the time she left Sand Bay until the collision?

A. Not as I recollect. I don't remember that there was any change.

Q. When did you go below after she left Sand Bay?

A. At twelve o'clock. It was supposed to be 12 o'clock or 8 bells.

Q. At that time how were her sheets?

A. They were hauled aft—flat aft—on a wind as well as we could haul them aft by hand; there was no tackles to bouse them down.

Q. Have you not seen them hauled further aft than they were on that occasion?

254 A. Yes, sir; when we worked a vessel on a wind we used a tackle and boused them right down.

Q. You did not do that on this occasion?

A. No, sir.

Q. They were not what you call chock aft, were they?

A. No, sir; they were not supposed to be chock aft. I have seen them haul them aft with tackles when they call them chock aft and boused them right down.

Q. Did you know the man that was supposed to be on the lookout—Mott? You knew him, did you not?

A. Yes, sir; I was acquainted with him on that trip about 8 or 10 days.

Q. Do you know what kind of a man he was to stand on the lookout? Was he attentive to duty on that occasion?

A. I don't know anything about him whatever. I was not the officer. I did not pay any attention as to how he did stand his watch. The mate and him was always on the growl about his watch, but I did not know why it was.

Q. Did you see him while he was on the lookout that night, or afterwards?

A. I saw him afterwards, immediately afterwards. I heard a noise, and the mate sung out to the schooner to keep off, and I rushed out on deck and saw Robert Mott sitting on the end of the windlass with his hand on his head, leaning against the pallbit.

Q. Did you see any blanket around there?

A. No, sir; he took one upon deck when he came to stand his watch, but I did not see it at that time.

255 Cross-examined by Mr. TERRELL:

Q. Where are you living now?

A. At Mentor, sir.

Q. Did you sail last year?

A. Pretty much all the season, sir.

Q. On what vessel?

A. In different ones. The times were so bad that vessels lay up that I was on, and I was obliged to sail in different ones on that account. The William Young was the first one, and then I went in the scow Danbury, and in the D. K. Keys with Captain George Granger.

Q. Who came for you to testify to this?

A. Mr. Ingraham served the summons.

Q. Who talked to you about coming to testify?

A. Nobody.

Q. Have you got the summons?

A. No, sir; I have not got it here.

Q. You testified once already in this case, have you not?

A. Yes, sir; about three years ago I think it is.

Q. Did anybody talk to you about it since?

A. Yes, sir; the men that was in the vessel when we got together would sometimes speak about it.

Q. Who do you mean?

A. The mate is a brother-in-law of mine, and his brother is the second mate; we were raised right together, and my father was there.

Q. You talked with nobody respecting the other side?

A. No, sir.

Q. How long before the collision did you come on deck?

A. I should judge it was about 5 or 10 minutes.

Q. How far were the vessels apart then?

256 A. When I saw the Osborn lights she could not have been more than 3 rods on her port bow dead ahead.

Q. Did it take 5 or 10 minutes to go that 3 rods?

A. I don't swear positively that it was five or ten minutes. I have no means of recollecting how long it was. I said I supposed it was that long; it might have been that long or not so long.

Q. Do you suppose it would have taken 5 or 10 minutes to come together when they were three rods apart?

A. I don't know, sir.

Q. When you came up what part of the vessel did you go to?

A. To near the foremast and stood there. My father was yet in the forecastle, and I was very anxious for him to come out of there, and called to him to come out of there, and ran toward the forecastle again, and turned around to see if he was coming out, and stood midway between the foremast and forecastle.

Q. How did Mr. Wilcox come to know that you testified to these facts about the lights and the lookout?

A. I don't know, sir.

Q. How did he find it out?

A. I don't really understand you.

Q. How did Wilcox find out that you testified with respects to the lights of the Union and the lookout of the Union?

A. It was none of my business how he found it out.

Q. You never told it to anybody, I suppose, did you ?

A. No, sir.

257 Q. This is the first time you ever mentioned it here this afternoon ?

A. Yes, sir.

Redirect examination :

Q. Did not you mention this to Ingraham, your brother-in-law, when you were talking it over with him ?

A. No, sir ; I never mentioned it to him at any time or place that I recollect of.

ALBERT S. OUTIS.

The stenographic notes were signed by the witness ; the above transcript was signed by John Biggs, the stenographer and notary, for the witness, by agreement.

J. BIGGS, *Notary Public*.

E S. OUTIS, of lawful age, being first duly sworn, as hereto certified, was examined by Mr. CONDON, and deposes as follows :

Q. What is your business ?

A. I was in my younger days a sailor ; in former days a farmer ; and sailed more or less.

Q. Do you remember the collision between the S. S. Osborn and the American Union ?

A. Yes, sir.

Q. Were you on board of any of these vessels at that time ?

A. I was on board the American Union.

Q. Where were you from 9 to 12 o'clock that night ?

A. My watch was on the fore-castle-deck, on the lookout.

Q. Was there any change in the wind from the time you left Sand Bay until 12 o'clock ?

258 A. The wind was fair from the time we left it until we got well around the point, when we came to leave the light upon the quarter abaft the beam it became more ahead, so that we braced up sharp, and, as we sailors call it, flattened aft the sheets.

Q. Did you brace your sheets as flat aft as they could be got ?

A. No, sir ; I have known them to be bound down with a watch-tackle, and we had not done that. I could not say that there was any need to ; the wind was not so strong as that it required a watch-tackle, and we had two or three times at it ; and once I spent about ten minutes in the neighborhood of 12 o'clock hauling aft.

Q. Did you notice the lights of the American Union that night, on your own lookout ?

A. Well, I had noticed them before and since, but I would not positively say that I saw them on that night more than formerly. I did not steer or go aloft, but had all of the lookout and rousing about, and I looked at the lights from where I stood on the lookout, and could always see one of them from there.

Q. Did you ever have any trouble with her lights ?

A. Not that I know of ; I did not attend to them, and never put them out but once, and only assisted then in putting them out on the port side. It was a new thing for me and I was never initiated into it.

Q. Who took the lookout after your left it ?

259 A. He went by the name of George Mott, and claimed to live in Michigan, about 12 miles from Detroit. His father used to be a tugman.

Q. Did you notice whether he had anything with him or not, when he came to relieve you on the lookout?

A. Yes, sir; he had a blanket, although I never testified to that before. I said to him, "You are not going to lay down, are you?" and he made me no reply. In fact he did not say that he was going to lay down, but said he was going to wrap up in it. He had no overcoat.

Q. How long had you sailed with him?

A. Well, it was, I think, the 13th of August, and then we were only some four or five days out. It was the 19th, if my memory serves me right.

Q. You had not sailed with him before that trip, had you?

A. Not for 21 years with him. No, sir; I never sailed with any other party that was on board.

Q. Do you know what kind of a man Mott was?

A. No, sir; I am very happy to say that I was in the town of Mentor at that time.

Q. How could you be in both places at the same time; you were on board of this vessel at the time of the collision?

A. Yes, sir; but now I don't think it was on the 19th; I may have been mistaken.

No cross-examination.

E. S. OUTIS,
Per JOHN BIGGS,
Stenographer.

The witness signed the stenographic notes.

J. BIGGS.

260 EDWARD INGRAHAM, of lawful age, being first duly sworn, as hereto certified, was examined by Mr. CONDON, and deposes as follows:

Q. Do you remember the collision between the schooner S. S. Osborn and the American Union, in August, 1872?

A. Yes, sir.

Q. Were you on board of either of those vessels at that time?

A. Yes, sir; I was on the American Union.

Q. About when did you leave Sand Bay, that night?

A. It has been quite a spell since; I don't know. I could not swear to that, sir; I forget the time.

Q. About what time did the collision take place?

A. It was a little after twelve o'clock.

Q. About how long had she been sailing before that occurred?

A. Well, about—I could not tell exactly how long; I don't know what time it was when we got under way, or I could tell what time she had been sailing, but I did not take notice what the time was; it has been so long I forget it.

Q. Did you come on deck when they were getting her under way?

A. Yes, sir.

Q. Did you remain on deck from that time until the collision, or did you go below?

A. I went below, sir, after we got her all cleared up.

Q. Whereabouts was she in reference to Beaver light when you went below; was it in sight then?

A. I could not say, sir; it has been so long that I could not say; a fellow forgets such things if he has not got them in his mind all the time.

261

Q. How was she going when you went below, so far as her sheets and booms indicated?

A. We were by the wind, sir.

Q. When you went below, I mean?

A. I could not say to that either. I don't remember exactly how she was.

Q. Were you on deck at the time of the collision?

A. Yes, sir.

Q. How were the sheets of the vessel at that time?

A. They were what we call chock aft; that is, without using tackles. Sometimes we haul them chock aft by hand, and say that will do.

Q. Did she have tackles for that purpose?

A. We had tackles that we could put on if we liked.

Q. Were they as flat aft as they could be?

A. No; I don't believe they were, because we could put on the tackles and get them a little further aft, but we hauled them what we called chock aft by hand; but if we would put on tackles perhaps we would get a little more and have a bigger purchase on them.

Q. Do you know Mott, who was said to be on the lookout at the time of the collision?

A. Yes, sir.

Q. Did you see him when he was on the lookout or when he came off it?

A. I saw him on the lookout; that is all.

Q. Did he have anything with him when he went on the lookout that you noticed?

A. It was dark; he had something, perhaps a coat or a blanket, but I would not swear whether it was a coat or a blanket. I would not be sure whether it was a blanket or a coat.

Q. Did you notice any change in the wind from its direction from what it was when you came on deck from what it was when you went below?

A. No, sir. I don't think now what it was, it has been so long ago.

Q. What kind of lights did the Union have that night?

A. She carries a green and a red light.

Q. Did you ever have any trouble with them while you were on board of her?

A. Sometimes we did and sometimes we did not. Sometimes they burned real nice and other nights they would bother us a little. Sometimes they would flash up and smoke up and go out, or something of that kind, and sometimes they would be good lights, some nights they were not so good.

Q. Do you know what kind of a man Mott was for a lookout?

A. Well, I really was not much acquainted with him, but I don't think he was to be trusted to keep a lookout.

Q. Why?

A. Well, because he is somewhat like myself; he thinks a little too much of sleep.

Cross-examination by Mr. TERRELL:

Q. How long have you sailed with Mott?

A. I had not sailed with him very long. He was in the Union with us. I was not much acquainted with him, but only for that trip.

Q. You were out about 4 days; four or five days at that time?

A. Yes, sir. Let me see how long, perhaps it was a little longer. I

won't say for sure how long we had been out; we had not been out very long anyway.

EDWARD INGRAHAM,
Per JOHN BIGGS, *Stenographer*.

The stenographic notes were signed by the witness.

J. BIGGS.

CHARLES O. INGRAHAM, of lawful age, being first duly sworn, as hereto certified, was examined by Mr. CONDON, and deposes as follows:

Q. State your name, age, residence, and occupation.

A. My name is Charles O. Ingraham. I am 34 years of age. I reside at South Haven, in Michigan, and my business a sailor.

Q. Do you remember the collision between the American Union and the schooner S. S. Osborn in August, 1872?

A. Yes, sir; I do.

Q. Were you on board of either of these vessels; and, if so, on which?

A. I was on board of the American Union.

Q. In what capacity?

A. As first mate.

264 Q. Do you remember about at what time on that evening the Union got under way from Sand Bay, or the time she left Sand Bay?

A. It was about 9 o'clock from my recollection now, it is so long ago that I forget, but it was somewhere about that.

Q. Was there any change in the wind from that time until the collision?

A. I don't think there was.

Q. How were the sheets of the American Union at the time of the collision?

A. They were aft.

Q. Were they what you call chock aft, or merely aft?

A. They were merely aft, sir. If we was on the lake, or working through the straits, or wanting to do sharp work we would get them closer.

Q. Did you ever have any trouble with the lights of the Union while you were on her?

A. Yes, sir; more or less; sometimes they would fail us and go out.

Q. How was it with the lights in windy weather?

A. They bothered us considerable in what I call heavy weather.

Q. Do you know Mott; he was acting as lookout, or was said to be at the time of the collision?

A. We had a man of that name, sir.

Q. Where were you when you first saw the green light of the approaching vessel?

A. I was on our quarter, our port quarter.

Q. Did you see the lookout shortly after that?

A. I did, sir.

265 Q. State where he was, and how you found him, and what you did before that.

A. A few minutes before I saw the light, I was on deck and saw the outlook leaning against the staysail boom, and I spoke some pretty harsh words to him and he was a little abusive, so I helped him to get down off the top-gallant fore-castle.

Q. Describe his position when you saw him there.

A. He acted as though he was a little tired and did not care if he

kept the outlook or not. He was leaning against the staysail boom and was resting himself with his hand to his head.

Q. How near were you to him when you saw him in that position ?

A. I cannot tell exactly ; when I first saw him I was at the fore-mast.

Q. You went up to him and took hold of him ?

A. I did, sir.

Q. How was his head and face at that time, how was it inclined ?

A. He was looking forward and downward.

Q. Do you know whether he was awake or not at that time ?

A. I could not possibly swear that the man was asleep or that he was awake. If he was awake it was pretty hard for him to hear.

Q. What did you do forward there, before you went up to him and saw him in that way ?

A. I hollered pretty loud to the Osborn to make them hear.

Q. Did you notice whether the outlook had anything with him at that time ?

266 A. He did have something with him, sir ; I cannot say positively whether it was a blanket or a quilt, or what it was ; he had something with him, but I cannot swear whether it was a quilt or blanket, or it might have been a bed-tick for all I know.

Q. You testified on behalf of the American Union, did you not ?

A. Yes, sir.

Q. Since this collision occurred have you received any money from the captain of the American Union or her owners, or have you been promised anything ?

A. I received a little money from the owners. I was in Buffalo last summer when Mr. Winslow told me to come to Cleveland and he would pay me for it, and I came up here. I was here two days, or at least the biggest part of two days. He was to give me six dollars a day. They were building a big steam-barge over here. He took me in his buggy and drove me up to the office and he told me that he could not do anything with me, and so I went on home.

Q. How much per day did he pay you for your time ?

A. Six dollars per day.

Q. What were you doing there ?

A. I was idle at that time, sir. I had left the barque Munerea in Buffalo. I was mate of her.

Q. Did Parsons, the master of the American Union, after the collision promise you anything on account of the collision ?

A. Yes, sir ; he said he would buy me as good a suit of clothes as we could get in Cleveland immediately after the collision had occurred, when we had got through our hurry.

267

Cross-examination by Mr. TERRELL :

Q. You said you hollered to this lookout two or three times and he did not seem to hear you. You said you hollered to him two or three times ?

A. No, sir ; I said I hollered to the Osborn.

Q. You did not seem to disturb him much ?

A. No, sir.

Q. That was after you saw the lights of the Osborn ?

A. Yes, sir.

Q. You had not heard him say anything preparatory or previous to that time to indicate that he was awake or attending to business at the time of the collision ; when you made the lights of the Osborn you had not heard anything from him at all ?

A. No, sir.

Q. He did not report the lights or anything ?

A. I forget whether he reported the lights or not.

Q. If he was asleep he did not, did he ?

A. No, sir.

Q. Did you hear anything from him at all, or not ?

A. I cannot answer that at all, for I forget.

Q. You described his position as leaning on his hand with his head forward and looking down, and you say you don't know whether he was asleep or not ?

A. He did not say anything when I was forward, but I don't believe the man reported the light, and yet I forget whether he did or not.

Q. How came you here to-day ?

A. I came down to see father; he wrote to me a little while ago.

268 Q. You lived at South Haven, Michigan.

A. Yes, sir.

Q. After you got here who came to talk to you about this matter ?

A. Nobody, sir.

Q. How did Mr. Wilcox, or any one representing him, know that you would testify to those facts that you now testify to ?

A. I don't know.

Q. Did you ever mention them to any one ?

A. No, sir.

Q. Is this the first time you mentioned them to anybody since the collision ?

A. Not since last summer.

Q. Then you did not mention these facts to anybody since the collision until this afternoon ?

A. I believe I did tell my brother of it; the one that is in Painesville now. I guess I did tell him once about it.

Q. Does Mr. Wilcox live in Painesville ?

A. Yes, sir.

Q. What is your brother's business ?

A. He owns a scow and sails her.

Q. Has he any interest with Wilcox in any vessels ?

A. I don't think he has, sir.

Q. You never had any correspondence with respect to this with Wilcox ?

A. No, sir.

Q. When do you say you think you mentioned it to your brother Dan ?

269 A. I think it is a year ago last summer. I was mate with him in the Hazard, and we got talking about it, and he said "You had some trouble right along here," and I said "Yes, we had some trouble right over there somewhere." I cannot say that I told him about it. I may not have told him the same as I told you.

Q. Do you remember telling him about this lookout having a blanket with him ?

A. My opinion is now that I did tell Dan that the outlook was asleep.

Q. Do you swear to that now, that he was asleep ?

A. I say that he was either asleep or else tired.

C. O. INGRAHAM,
Per JOHN BIGGS,

Stenographer.

The short-hand notes were signed by the witness in my presence.

J. BIGGS.

THE STATE OF OHIO,
Cuyahoga County, ss:

I, John Biggs, a notary public in and for the county and State aforesaid, duly commissioned and qualified, do hereby certify that the above named Wm. Seamans, Stephen Lampot, J. H. Andrews, Albert S. Outis, E. S. Outis, Ed. Ingraham, and Charles O. Ingraham were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them respectively subscribed as above set forth were reduced to writing by myself, I being a proper person and not interested in the suit, in my presence and in the presence of the witnesses respectively, and were subscribed by said witnesses in my presence, and were taken at the time and place in the annexed notice specified, and continued from day to day as above set forth.

I do further certify that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit.

In witness whereof I have hereunto set my hand and seal of office
this seventeenth day of March, A. D. 1876.

[SEAL.]

JOHN BIGGS,
Notary Public.

United States district court of the northern district of Ohio.

THE STATE OF OHIO,
Cuyahoga County, ss:

WILLIAM G. WINSLOW ET AL., LIBELLANTS, }
against
 SCHOONER S. S. OSBORN, DEFENDANT. }

The libellants will take notice that on Wednesday, the 29th day of March, A. D. 1876, the above-named defendant will take the deposition of William Price, of Cleveland, Ohio, sundry witnesses, to be used as evidence in the trial of the above-entitled cause, at the office of Prentiss and Varce, No. 4 Rouse block, in the city of Cleveland, county of Cuyahoga, and State of Ohio, between the hours of 8 o'clock a. m. and 6 o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day between the same hours until they are completed.

PRENTISS AND VARCE,
Proctors for Defendants.

I acknowledge service of the above notice by copy this 24th day of March, 1876.

WILLEY, TERRELL AND SHERMAN,
Proctors for Libellants.

Depositions taken before me, a notary public within and for the county of Cuyahoga, in the State of Ohio, pursuant to the annexed notice, at the time and place therein specified, to be read in evidence on behalf of defendant in an action pending in the district court of the United States in and for the northern district of Ohio, in which William G. Winslow and Hezekiah J. Winslow are libellants and the Schooner S. S. Osborn (B. O. Wilcox, claimant,) defendant. Present, H. L. Terrell, on behalf of libellants, and C. M. Varee, on behalf of defendants.

WILLIAM PRICE, of lawful age, being by me first duly sworn as hereto certified, deposes and says as follows:

- Q. State your name, age, occupation, and place of residence.
- 272 A. My name is William Price; am 30 years of age; am a seaman by occupation; have sailed most of the time since I was 12 years of age. I reside in Cleveland, Cuyahoga County, Ohio.
2. Q. Where were you in 1872, during the month of August?
- A. On the Fayette Brown, as mate.
3. Q. Whereabouts were you and your vessel on the day in which the collision between the schooner S. S. Osborn and American Union occurred?
- A. We were then on the passage from Beaver Island to Green Bay.
4. Q. When, if at all during that day, did you see the schooner S. S. Osborn, and where?
- A. In Poverty Passage. She was coming out Poverty Passage and we were going in Summer Passage just before dark.
5. Q. How did you know it to be the Osborn?
- A. By the build of the vessel and by asking for information after we got to Escanaba.
6. Q. What canvas was your vessel then carrying?
- A. Plain-sails and square-sail. Plain sail means all the fore-and-aft sail. We could just lay our course from the passage to Point Peninsula, and from there we had to beat.
7. Q. What canvas was the Osborn then carrying?
- A. All her fore-and-aft sails, including her gaff and topsails.
8. Q. How was the wind at the time you saw the Osborn?
- A. North by east.
9. Q. How did you ascertain this?
- A. By taking the bearings of the compass at the fly and mast-head.
- 273 10. Q. What change, if any, was there in the wind during the night?
- A. None during that night; none at all until morning, and what occurred after that I can't tell. Between 12 and 1 we took in our square-sail. We got to Escanaba about daylight.
11. Q. How do you identify this occasion as being the day of the collision between the schooner S. S. Osborn and the American Union?
- A. When we got to Escanaba we enquired what vessels had left, and were told that the schooner Osborn and the bark Nelson had left that day. The day after we arrived the American Union came into Escanaba damaged forward; her mate told us that they had a collision with the Osborn, and I lent them some spare headsails.
12. Q. How was the Osborn's canvas when you saw her in the passage?
- A. It was pretty well aft. It was remarked on our vessel that if it came on to blow very hard that the Osborn would have a pretty tough time of it to make her course.
13. Q. Did you see the barque Nelson on the same day?
- A. Yes, at the same time; a long way to leeward. She looked to be making Rock Island Passage.
14. Q. Which can sail the closer to the wind, a fore-and-aft or a square rigged vessel?
- A. A fore-and-aft.
15. Q. How much closer?
- A. A couple of points with the average of vessels; some will do better than others.

16. Q. How do you account for the Nelson's taking Rock
274 Passage instead of Poverty Passage?

A. I should judge that the wind was too close for her; she would have to beat to make Poverty Passage, and, night coming on, she wanted to get out into the lake while daylight lasted.

17. Q. When did you see the Osborn next?

A. At Cleveland, on our arrival here.

18. Q. Was she damaged?

A. Yes; her bow was stove in, foremast gone, and other damage.

19. Q. Are you able to state the day of the month on which this collision occurred?

A. No, sir; but I know it was in 1872.

Cross-examination waived by libellant's proctor, H. L. Terrell.

Certificate to depositions.

STATE OF OHIO,

Cuyahoga County, ss:

I, W. J. Hudson, a notary public in and for the county and State aforesaid, duly commissioned and qualified, do hereby certify that the above-named William Price was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed as above set forth was reduced to writing by me in the presence of the witness, and was subscribed by the said witness in my presence, and was taken at the time and place in the annexed notice specified.

275 I do further certify that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit.

In witness whereof I have hereunto set my hand and official seal this 29th day of March, A. D. 1876.

[SEAL.]

W. J. HUDSON,
Notary Public.

In the district court of the United States for the northern district of Ohio.

W. G. WINSLOW ET AL.

vs.

THE SCHOONER S. S. OSBORN ET AL.

} In admiralty. April term, A.
D. 1877.

Willey, Terrell and Sherman.

Prentiss and Varea and Condon.

Present on the part of the libellant H. L. Terrell, of Cleveland, Ohio.

Present on the part of respondent Loren Prentiss, of Cleveland, Ohio, and William H. Condon, of Chicago, Ill.

A. Kippard, stenographer, Cleveland, Ohio.

TUESDAY, May 1st, 1877.

This day came the parties and their attorneys in the above-entitled cause and proceeded to the trial of the same, as follows:

After a statement of the case by counsel for the respective parties, counsel for libellant read in evidence the depositions of the following-

276 named witnesses: Robert Parsons, Charles O. Ingraham, Edward Ingraham, E. S. Outis, Albert Outis, George Magley, Frank Wicks, Thomas Gilkison, Albert Landreth, Alexander Stewart, John McCoy, Thomas Banner, Frank Debbige, William Bayne, L. S. Rum-

mage, Edwin M. Perkins, Maurice Barrett, Christopher Moore, and John P. Cotton.

Libellant rests.

Defence.

Council for respondent read in evidence the depositions of the following-named witnesses: C. V. Vogler, Capt. John Collins, James Bowen, W. W. Bates, John G. Keith, William Seaman, and John Tice.

Adjourned until Thursday, May 3rd, 1877, at 9 a. m.

THURSDAY, May 3rd, 1877—9 a. m.

Council for respondent read in evidence the deposition of William Carey.

Mrs. MAGGIE PAYNE, as witness called on behalf of the respondent, being first duly sworn, was examined in chief by Mr. CONDON, and testified as follows:

Q. Mrs. Payne, where do you reside?

A. Painesville, Ohio.

Q. How long have you lived there?

A. Twenty years.

277 Q. Do you know Mr. B. O. Wilcox?

A. Yes, sir.

Q. How long have you known him?

A. Fifteen years perhaps. It is a long time.

Q. Are you acquainted with Mrs. Wilcox?

A. Yes, sir.

Q. Were you ever on board the schooner S. S. Osborn, in the summer of 1872?

A. Yes, sir.

Q. During what month?

A. During the latter part of July and first of August.

Q. What other ladies were on board of her with you?

A. Mrs. Wilcox and her daughter, Mrs. Loomis, and Mrs. Smith.

Q. Where are those ladies now?

A. Mrs. Wilcox and Mrs. Loomis are here, Miss. Wilcox is dead, and Mrs. Smith is in Painesville.

Q. Miss Wilcox was the daughter of Mrs Wilcox?

A. Yes, sir; she is dead.

Q. Were you on board of the vessel the night of the 9th and 10th of August, when there was a collision between her and the American Union?

A. Yes, sir.

Q. Where were you that evening between seven and eight o'clock?

A. Most of the time sitting on the deck, perhaps in a few moments, and remained out on deck.

Q. Whereabouts did you sit on deck?

A. Near the cabin, between the cabin door and kitchen door. There was a porch overhead.

Q. Little awning?

A. Yes, sir.

278 Q. The awning was a part of the cabin?

A. Yes, sir; the roof.

Q. What kind of weather was it about between seven and nine o'clock that night; did it rain any, do you remember?

A. I do not recollect exactly what time it cleared off—stopped raining. It had been raining?

Q. Well, did you remain on deck long that evening?

A. Yes, sir.

Q. From about 9 o'clock were you on deck all the time for quite a while?

A. Yes, sir.

Q. From nine to a little after eleven where were you?

A. I was on deck.

Q. Sitting there in front of the cabin?

A. Yes, sir; same place.

Q. What kind of a night was it during that time, whether it was clear and starlight or dark?

A. It was very dark; it had been storming very hard in the early part of the evening, and it was very dark at that time.

Q. What other ladies were out there on deck with you, if any?

A. Mrs. Loomis was with me.

Q. Did you notice the position of the main boom of the vessel, that is the stick of timber at which the mainsail is made fast, the lower piece, the main boom?

A. The stick that came toward us, that lay this way (indicating)?

Q. Yes, coming toward you from the mainmast; did you notice its position, whether it was across the vessel's rail?

A. No, sir; it was not. It did not stand out this way over the rail (indicating).

Q. How was it with the mainmast and sail; did you sit right back of the mainmast?

A. Yes, sir; it was very near over our heads. It might have been a foot perhaps beyond the centre where we sat, but it was very nearly straight with us, where we sat.

Q. How long had it been so. This is the mainboom (indicating on model); you sat, if I understand you, right here in front of the cabin (indicating)?

A. Yes, sir; one came up through the cabin, I think (referring to mast).

Q. The mizzen on the Osborn came through the cabin?

A. Yes, sir; as I remember it.

Q. Where did you sit with reference to the cabin?

A. If they call this the cabin right here in the centre (indicating).

Q. There was an awning you say over the cabin?

A. The kitchen came up here (indicating) and the cabin where we sat came here (indicating) and in between there was a niche, and we sat there (indicating), one door came this way (ind.) and the other came this way (ind.) and the roof came over the hall.

Q. The mainmast was some distance ahead of you, was it not?

A. Yes, sir.

Q. The mainboom I referred to is this (ind.)?

A. Yes, sir.

280 Q. Suppose you to sit here and the cabin to extend to here, describe how that main boom stood?

A. Very nearly straight. In that position (ind.) I sat on this side of the porch (ind.) and Mrs. Loomis on the other side.

Q. On the right-hand side?

A. Yes, sir; I was on the right-hand side.

Q. What was you doing on the deck ?

A. Looking at the storm when it was storming, and afterwards we were sitting and talking.

Q. Any waves of the sea come over the vessel while you sat there ?

A. Yes, sir ; quite a heavy sea.

Q. If any spray or sea came on deck, where did it come on ?

A. We noticed it mostly in the forward parts of the boat. The spray dashed up.

Q. About how far forward ?

A. Clear at the end.

Q. At the bow of the boat ?

A. Yes, sir.

Q. On which side of the vessel did it come over, the right-hand side or left-hand side ?

A. The left-hand side as we sat facing forward.

Q. Was there anything about that spray that attracted your attention ?

A. It looked red, that is the way we noticed it.

Q. While you sat there, for what length of time did the spray come over there red ?

A. As I remember most of the time, we were speaking of it, I had never seen anything like it before.

Q. And you talked of it, did you ?

281 A. Yes, sir ; Mrs. Loomis and I spoke of it. I think all the others too—some of them.

Q. Were you on deck immediately after the collision ?

A. Yes, sir.

Q. Where did you go ; did you remain on that vessel, or go on to the Union ?

A. We went on to the Union.

Q. Did you go into the cabin when you got on to the Union ?

A. Yes, sir.

Q. Did you notice what time it was when you got there by the clock ?

A. It was after twelve by their clock ; their time was faster than ours, as I remember.

Q. When you left your vessel and went on to the American Union was it light or dark ? What kind of a night was it then ?

A. It was a dark night when we went on. It cleared up in a few hours.

Q. How was it in regard to distinguishing people on deck at that time ?

A. It was very dark. I think I should not have been able to have told any one. Could hardly see the side of the American Union when we got over at that time.

Q. Were you a friend of Mrs. Wilcox's daughter ?

A. Yes, sir ; neighbors of ours.

Q. She was sick at that time ?

A. No, sir ; she was not sick until her last sickness ; she had not been well ; some of the ladies were sea-sick ; she was not feeling well and went to bed.

Q. You was traveling as company for her, were you ?

282 A. Yes, sir ; and for her mother, all together.

Q. Did you notice immediately after the collision the position of that main boom, how was it standing, or had it settled down ?

A. It had settled down on the roof of the cabin.

Q. The extreme end of it extended over the roof of the cabin?

A. I could not say.

Q. Well, on to the main roof?

A. I think it was on to the cabin roof, and the end of it I do not remember.

Q. As it lay there what was its position in regard to the vessel, how did it settle down.

A. It fell where it had been through the evening; same position.

Q. Did you notice whether it had been moved any after the collision?

A. I do not think it had. I went back in a few hours on to the boat and it was still there.

Q. In the morning did you notice any change in its position?

A. No, sir.

Q. It was almost straight with the mast?

A. Yes, sir.

No cross-examination.

Mrs. CYNTHIA LOOMIS, a witness called on behalf of the respondent, being first duly sworn, was examined in chief by Mr. CONDON, and testified as follows:

Q. Where do you reside?

283 A. In Painesville.

Q. How long have you lived there?

A. Nearly 30 years.

Q. Do you know Mrs. B. O. Wilcox?

A. Yes, sir.

Q. Did you know her daughter during her life-time?

A. Yes, sir.

Q. Were you on board the schooner S. S. Osborn on the night of the 9th of August, 1872, when she had a collision with the American Union?

A. Yes, sir.

Q. What kind of weather prevailed during the evening, say from seven o'clock to nine o'clock?

A. It was dark and stormy.

Q. Did it rain any?

A. It rained in the early part of the evening. I think it stopped after a short time, but it had been a rainy evening.

Q. Were you on deck during that evening?

A. Yes, sir.

Q. How much of the time?

A. Well, a good portion of the time.

Q. Where were you while on deck? Did you remain in any particular place?

A. Yes, sir; all the time sitting the projecting roof of the cabin, between the kitchen and the cabin door.

Q. Were you back of the front part of the cabin as you sat in that niche, or were you on a line with the front part of the cabin?

A. We were under the roof. The cabin projected upon one
284 side and the kitchen upon the other and there was a niche between and we sat in that niche, under the shelter.

Q. When did you go there that evening and stay quite a while?

A. I do not remember the time we went out; some time during the evening.

Q. Do you remember when you had tea that evening?

A. Yes, sir; we had tea usually about six or half-past six, I think.

Q. About the same time that night as other nights?

A. Yes, sir; as usual.

Q. And after tea you went on deck?

A. I was in and out of the cabin.

Q. Did you notice while you sat there during that evening the position of the main boom?

A. Yes, sir.

Q. What was its position with reference to the mainmast?

A. It was nearly, as they call it, "flat aft." It was remarked at the time that the boom was nearly "flat aft."

Q. In your language how was it?

A. It was nearly straight back from the mainmast; just a little toward the right as we stood there.

Q. Was that niche in the cabin about the centre of the vessel?

A. Yes, sir.

Q. As you sat there did any part of the boom project over where you was sitting?

A. Yes, sir.

Q. About how wide was the place in which you and the other lady sat?

A. I should think about the width of this space (indicating).

285 Q. Six or eight feet?

A. I should think it was about six or eight feet; I do not know the distance exactly, I should judge it was about that.

Q. Was the mainmast about in the centre of that distance?

A. Yes, sir; about the centre.

Q. And the main-boom as it extended over your head was a little to the right of you, or of that space?

A. A little to the right of the centre, I should think, of the vessel.

Q. How was it with reference to that space then; as it passed over the cabin, did it pass over that space in which you sat?

A. Yes, sir.

Q. Was there any change made in the position of that boom while you were on deck that evening?

A. I do not remember of any change being made; I think there was not.

Q. If the crew had come aft there and changed the boom, the position of it, hauled it in or let it out over the rail, would you have noticed it?

A. I think I should; I am quite positive it was there all the time.

Q. How late did you remain on deck that evening?

A. I think it must have been eleven before we went into the cabin.

Q. Was there any spray or sea came on to that vessel while you were there that evening?

A. We saw the spray at the bow of the boat.

Q. The right bow or left?

286 A. On the left bow as we sat there, I sat on the left side of this niche, as I faced the bow of the boat the spray came up on the left side.

Q. Did you notice anything particular about it?

A. Yes, sir; I noticed the light from the lantern, the light that was carried on the bow of the boat, the red light threw its reflection upon that spray, and I remarked how beautiful it was.

Q. Did it appear to color the spray?

A. Yes, sir; it colored the spray, made it look rosy.

Q. Could you see the light itself?

A. No, sir; only the reflection.

Q. Did you remark?

A. Yes, sir; I spoke of it.

Q. To whom?

A. To Mrs. Payne; I do not know but I called the others. It was so beautiful, something I had never seen before.

Q. When you went below what kind of a night was it; do you remember?

A. It was dark; it was cloudy and quite dark.

Q. Did you see any stars?

A. No, sir; I do not remember of seeing any stars. It was dark.

Q. Did you notice the position of that main-boom after the collision had taken place?

A. Yes, sir.

Q. Had its position changed any?

A. No, it had not changed.

Q. Was the main-boom still hanging, or had it settled down on the cabin?

A. It had settled down; all of the rigging before the mainmast was gone.

287 Q. One of the masts fell?

A. The foremast fell.

Q. Where did it fall?

A. On the deck, and it fell against the mainmast and broke it in two; fell against the cross-trees; I know that it broke in two as it fell.

Q. That is the foremast broke in two?

A. Yes, sir.

Q. Did it lay on the deck?

A. Yes, sir.

Q. Was the position of the main-boom changed any from the time of the collision until next morning?

A. No, sir; not to my knowledge.

Q. You noticed it in the morning?

A. Yes, sir; I noticed it.

Q. It was in the same position?

A. Yes, sir.

Q. Were you on deck shortly after the collision?

A. Immediately after the collision.

Q. How long did you remain on deck?

A. But a very few minutes; we thought the boat was going right down.

Q. Did you look around when you came on deck?

A. Yes, sir.

Q. Did you find the weather bright and clear?

A. No, sir; we found it dark; we found a boat alongside of us. It was so dark that at first I did not distinguish that boat; I called to know what was the matter, and they said a boat had run into us.

Q. The vessels had not been lashed together at that time?

A. No, sir; they were fastened together by the rigging.

288 Q. Was it light enough on deck right after the collision when you went on deck to distinguish people's countenances.

A. No, sir, it was not; I say I could not at first distinguish that boat that was alongside of us, it was so dark.

Q. Where were the Osborn and the Union in relation to the islands in the morning

A. We seen some islands.

Q. Large islands? Did you hear what island it was?

A. Yes, sir; I think they said they were the Fox Islands.

Q. Did you see any part of the island, or any object on the island?

A. Yes, sir.

Q. What did you see?

A. I saw a propeller lying there at the island.

Q. Was that the southern part of the island?

A. I cannot tell you; I was completely lost as far as the points of the compass are concerned.

Q. Could you easily distinguish that it was a propeller?

A. Yes, sir, very easily; we set up a signal of distress and expected they would answer it, but they did not.

Q. Who was on deck with you most of the time?

A. During the evening?

Q. Yes.

A. Mrs. Payne.

Q. Had you ever taken a trip on the water before?

A. No, sir; not a long one; never on a trip for pleasure before.

Q. How long had you been on that trip?

289 A. About two weeks. We had lain at Escanaba some time waiting for a boat.

Q. Did the vessels lay motionless together during the night, or was there any thumping?

A. O, they thumped. That made me sick.

Q. Was there considerable sea?

A. It seemed to me as though there was. I was badly frightened at first. I thought, of course, both boats would go down at once. It seemed to me as though the heavy boat was certainly crushing the sides of the light boat and we would all go down.

No cross-examination.

Mrs. LIDIA WILCOX, a witness called on behalf of the respondent, being first duly sworn, was examined in chief by Mr. CONDON, and testified as follows:

Q. 1. What is your name?

A. Lidia Wilcox.

Q. 2. Where do you reside?

A. Painesville.

Q. 3. How long have you lived there?

A. We lived in the village about fifteen years. I have always lived in the town.

Q. 4. Your husband was part owner of the schooner Osborn, in August, 1872?

A. Yes, sir.

Q. 5. Were you on board the schooner S. S. Osborn on the night of the 9th of August, 1872?

A. I was.

Q. 6. Name the other ladies that were there with you at that time?

290 A. Mrs. Loomis, Mrs. Payne, Mrs. Estella Smith, and my daughter.

Q. 7. Were you on deck any during that evening?

A. Yes, sir; some of the time. I was sea-sick some and had laid down until I got over it, and then I went out on deck.

Q. 8. Was it raining during that evening?

A. Yes, sir; we had a rain storm in the afternoon. It had rained some during that evening.

Q. 9. It had been raining during the evening?

A. Yes, sir; had a rain storm during the afternoon.

Q. 10. Was it clear, or dark and cloudy that night?

A. It was very dark and cloudy.

Q. 11. Had you ever been at sea before?

A. Yes, sir; it was the fifth summer I had been on the Osborn. I had been twice before to Lake Superior, and once to Oswego. It was was my fifth trip on the Osborn.

Q. 12. Did you notice after supper how the main-boom, which is this boom (indicating), laid with reference to the mainmast?

A. Yes, sir; it was in the centre of the boat, quite aft, up as near as they could haul it the blocks.

Q. 13. The blocks were together?

A. Yes, sir; I noticed when it was got around.

Q. 14. Was the main-boom in that position at 8 o'clock in the evening?

A. Yes, sir; it was there before 8 o'clock.

Q. 15. How did it remain while you were on deck?

A. It remained right in the same place.

Q. 16. When did you retire that evening?

291 A. I was up after eleven o'clock. I was back and forward. I laid down some part of the evening in the sitting room. I got up and looked out of the window and looked out of the door until I got a little sea-sick, and then I laid down again. I was up and down all evening. I was up after the clock struck eleven.

Q. 17. Where were Mrs. Payne and Mrs. Loomis until after eleven o'clock?

A. They were sitting in this little niche in front of the cabin.

Q. 18. The other ladies were in the cabin?

A. They were in the state-room. The captain gave it up and the girls went in there. They were in there.

Q. 19. Did you notice the position of that main-boom immediately after the collision?

A. Yes, sir; just as quick as there was any light so we could see anything.

Q. 20. Was it dark immediately after the collision?

A. Yes, sir; it was very dark. It was intensely dark.

Q. 21. How had the main-boom's position changed, if any?

A. Not any, except it dropped down on the cabin.

Q. 22. The end of it rested on the cabin roof?

A. Yes, sir.

Q. 23. Was it then midships, or nearly midships?

A. Yes, sir; it was fastened to the blocks below, and it dropped right down.

Q. 24. Did you notice any spray coming over the vessel that evening?

A. Yes, sir; several times when I was up.

Q. 25. What part of it?

A. The left-hand bow as we sat facing the bow of the boat.

Q. 26. What did you notice about that spray?

292 A. I noticed the reflection of the light, and it looked beautiful. They called my attention to it first when I was lying down. I saw it several times during the evening.

Q. What color?

A. Red. It was a red light.

Q. Was the vessel rolling any; was there much sea that evening?

A. Yes, sir; there was a considerable heavy sea struck the bow which made the spray, and the reflection of the light made it look better.

Q. How did the vessels lay after the collision?

A. They laid side by side. The American Union's bow and ours turned together.

Q. Did you lay together quietly?

A. Not very quiet. I thought the Osborn would sink every time we struck together. She was loaded heavily.

Q. When you got on deck after the collision did you hear any conversation between the masters of the different vessels in regard to the wind?

A. Yes, sir.

Q. How near were you to them, about?

A. They stood right in the middle of the boat, right in front of our cabin. I sat right on the side of the American Union (the boat is perhaps 30 or 40 feet wide), and they stood in the centre and I sat right at the bow of the American Union, close to our cabin.

Q. About how many feet were you from where they were?

A. About as far as from here to the window.

Q. About 10 or 15 feet?

293 A. Yes, sir; I think so.

Q. Did you hear the conversation between them?

A. Yes, sir.

Q. State it.

A. I heard Captain Seamans say that he had the wind close; he had the wind north by east. "No," said Captain Parsons, "I had the wind close; I had the wind north by east." Said he, "We will go right up and look." They went on to the quarter deck, to look at the binnacle or compass, and I followed them.

Q. How far were you from them?

A. I was right close by. I was not very many feet from them. I could see them as distinctly as I see you; they looked at the compass, and I heard Seamans say: "Captain Parsons, you will see that I am right. I have the wind north by east."

Q. Had they a light there?

A. The light was in the binnacle, and the steward had the light of the lantern. I saw Captain Seamans distinctly, and Captain Parsons, and Wesley Seamans, and the steward, I remember particularly, and Keith.

Q. What did he do with the lantern?

A. He stood with it in his hand; the steward had the lantern in his hand.

Q. Did he hold it so they could see in the binnacle?

A. Yes, sir; they could see in the binnacle aside from that. There was a light in the binnacle. Captain Seamans said: "You will see I am right; I had the wind close; I had it north by east."

Q. What was said about the compass, if anything?

A. Not anything.

294 Q. That was after they looked at the compass?

A. This was after they looked at the compass.

Q. Was there anything said about the fly of the vessel?

A. They looked at the fly, and they made this expression: "You will see I am right, that I have the wind north by east."

Q. Was there anything said about the stars ?

A. Not then ; after a while, perhaps an hour after that, I was standing there. I did not go in the cabin but a few times ; when I got cold I went in and staid a few minutes, and then went out again ; I think it was about an hour and a quarter after this conversation in the binnacle when Captain Seamans said : " Now, captain, there is a little fellow that never lies ;" and they looked at the north star ; and, says he, " You see that I am right ;" and Captain Parsons did not dispute him. He did not dispute the direction of the wind any time. He could not ; the wind was a contradiction all the time.

Q. Did you notice the fly yourself ?

A. Yes, sir ; I did ; that is the way I told where they stood.

Q. Compared with the direction of the north star ?

A. That is the way I told ; I could not tell the points ; it was a little east of north.

Q. Did the wind change any during the time you were on deck that night, that you noticed ?

A. Do you mean before or after the collision ?

Q. After the collision.

A. It got around more to the eastward.

295 Q. Were you on deck all the time during the night ?

A. All the time, except when I got cold ; I had no shoes on at the time of the collision, and I did not take any time to put them on, and my feet got cold, and I went in the cabin and got them warm, and then I went out again ; I thought the Osborn would go down every moment.

Q. How did the vessels drift ?

A. They drifted near the South Fox.

Q. Were you up before sunrise that morning ?

A. Yes, sir ; I did not go to bed. I laid down a few minutes on the lounge.

Q. Did you see a vessel at the South Fox ?

A. I saw a propeller there.

Q. Was it daylight ?

A. Yes, sir ; I must have seen her there. I was up at half-past four, perhaps earlier ; just as quick as you could see any object, I saw the propeller.

Q. Did you hear any conversation between the captains shortly after the collision ?

A. Yes, sir ; they came into the cabin of the American Union, and the captain got his charts and said he wanted to—

Q. (Interrupting.) Which captain ?

A. Both of them ; he wanted to find whether there was holding ground there ; he was afraid of drifting on the Fox.

Q. He said so ?

A. Yes, sir ; and they looked at their chart. At that time I was sitting and trying to get my feet warm.

Q. How could you tell it was a propeller ; was you close enough to it ?

296 A. Yes, sir ; we were so close I could see it was a propeller distinctly ; we could see its pipe, and spars, and wheel-house distinctly.

Q. Did you notice anything about the pipe ?

A. Yes, sir ; the pipe had two colors.

Q. Could you see the windows of the propeller ?

A. I think we could ; yes, we could see spots. The windows looked

very small, of course. We could see what we called the windows. We were talking to Captain Parsons about it; he had set a signal, and they did not pay any attention to it. He had the glasses in his hands, and was trying to make out the name; saying, if he could ascertain what propeller it was, they could be dealt with for not rendering assistance. I do not remember the words he used; he mentioned what he could see on the propeller.

Q. You saw what you stated on the propeller without the aid of glasses?

A. Yes, sir; I could see it distinctly with the naked eye; could see very much more plainer with the glasses; captain had the glasses in his hands.

Q. About how far were you from the propeller at that time?

A. As near as I could judge, I should think we might have been three miles.

Q. You say you have made five trips on the Osborn?

A. Yes, sir.

Q. Did you ever make trips on any other vessel?

A. Yes, sir; twice to Lake Superior and once with Mr. Wilcox to Buffalo, and once to Oswego.

297 Q. Does your husband own vessels?

A. He did at that time. He was always, since we were married, engaged in the vessel business, more or less.

Q. Does he keep an office?

A. He does at home, in our sitting room. He has a secretary there in the room.

Q. Was there any talk between the captains of the vessels that night in regard to the Union's lights?

A. Yes, sir. I heard Captain Seamans charge them with not having any lights out.

Q. Was that before the conversation about the compass and stars?

A. Yes, sir; it was right away after the collision.

Q. In the first conversation they had?

A. Yes, sir. The first thing I heard them talking about the collision was, I heard the captain ask him why he did not have lights out?

Q. The captain of the Osborn?

A. Yes, sir. He said they got lights out, and the capt. and he started aft to hunt them up.

Q. Did you the next morning stand on the American Union, or any part of her, to look at her lights?

A. Yes, sir.

Q. Whereabouts?

A. Well, I think a little forward of the fore-rigging. They had been talking so much it looked as if they wanted to get up something. Captain Seamans called my attention to where the lights were. If I had the model there, I could tell where we stood. (Counsel presented model to witness.) We stood by the fore-rigging, somewhere in

298 here (indicating), when the boat began to slant back, and we got pretty well back before we could see the screens. It was very misty, too, you know, and the lights were on the main rail. The screens were down on the main rail, and we walked back here (indicating) until we could range them. We went quite a piece back before we could see the screens.

Q. How near did you stand to the rail when you made this observation?

A. We were right up to the rail, and we leaned over until we found the screen.

Q. Where did the mizzen-mast on the Osborn come with reference to the cabin?

A. It came up just in between the dining-room and the clothes-press; that was in here.

Q. Ten or fifteen feet back from the awning?

A. Yes; I think about 15 feet back from the front of the cabin.

Mrs. Wilcox desires to correct her statement to the question in which she was asked whether the blocks were together. She had reference to the blocks on the mizzen-boom instead of the main-boom. The blocks on the mizzen-boom were together about as near as they could be got together.

A. HIPPARD, *Stenographer*.

No cross-examination.

Counsel for respondent read in evidence the depositions of William Smith, John McDonald, John Baker, and Peter Lieb.

299 Captain GEORGE JUDSON, a witness called on behalf of the respondent, being first duly sworn, was examined in chief by Mr. CONDON, and testified as follows:

Q. What is your name?

A. George Judson.

Q. What is your age?

A. Fifty-five.

Q. Where do you reside?

A. Cleveland, Ohio.

Q. How long have you lived here?

A. I have lived here about 18 years in the city.

Q. What is your business?

A. I follow the lakes for a living—sailing.

Q. How long have you sailed altogether?

A. Well, I have sailed vessels since '41.

Q. As what?

A. As master.

Q. How much of the time have you been master?

A. Good deal of the time.

Q. On what different kinds of vessels?

A. Sail and steam.

Q. How long have you sailed on the lakes?

A. I never sailed anywhere else only on the lakes.

Q. Familiar with the customs and usages on the lakes from your experience?

A. I suppose I am.

Q. From your knowledge and experience on the lakes, what would you say as to the propriety of a "three-and-after" carrying her lights on the monkey-rail, outside of the main-rail, just forward of the mizzen rigging?

300 A. I should not carry the lights aft on any vessel?

Q. Why?

A. They are not where you can see them. You are directly forward of them. They are obstructed by the rigging. There are two gangs of rigging back and before them, and there are the anchor stocks, among other things.

Q. How is it in regard to these vessels that tumble in—that are narrower at the mizzen rigging than forward?

A. They are still worse. (Presenting model to witness.) This “three-and-after” has another set of rigging back here (ind.), and the lights would be just about in this place (ind.). In a vessel coming dead ahead, and this (ind.) extending up 40 or 50 feet, you have to look through here (ind.). They obscure the light. You cannot get up high enough to look through to see this light unless you get out far enough on one side to look out on an angle.

Q. If the lights were carried forward, each side of the jib-boom?

A. If the lights are carried forward at the proper place, there is no time that we cannot see the lights when it is light enough to see, unless it is foggy or something. When you are directly forward you can see them both. That gives you to understand that when you see both lights that you are directly in range.

Q. Meeting end on?

A. Yes, sir.

301 Q. Your opinion, then, in regard to all three-and-afters is that they should carry their lights forward instead of before the mizzen rigging?

A. All sailing-vessels of all kinds.

Q. In case a three-and-after is from five to six feet wider forward from the main rigging than she is at the main rigging, what would you say as to the necessity in such a case in having them forward?

A. It is still a greater necessity. We have very frequently vessels in tow, and in having the lights in the after part of the vessel you cannot see them. It is a very common thing when they get around a bend or something so as to swing an angle you will see one of the lights.

Q. Have you been engaged much in towing sailing vessels?

A. Yes, sir.

Q. How is it in regard to having your lights at the mizzen rigging when a vessel lists over ahead?

A. Vessels listing over you would not see them until you got almost past or abreast of them; sometimes you get even by and not see a light. I have absolutely passed vessels with the mizzen over and not see the light until after we had passed.

(The witness here explained by means of a model.)

Q. Did you, in 1872, know the American Union?

A. Yes, sir; I have known her ever since she came out.

Q. Is it usual for such a vessel as the American Union to be sailing by the wind in an eight-knot breeze with her mainsail reefed, and not be carrying her mizzen?

302 A. No, sir; it is not.

Q. What objection is there to her not having her mizzen when she is by the wind?

A. Well light vessels in particular fall off. They won't keep up to the wind, and light vessels require all their after sails so they will steer well. In a rough sea they will drop off. On a wind they want all their after sails, and well up at that.

Q. What would you say in regard to a collision occurring about four miles to the westward of Beaver light, say about 12 o'clock at night, summer time, and one of the vessels was loaded and the other light, and the vessels lashed together, the stern of one to the bow of the other, and the light vessel kept her canvas on, and the canvas was taken off the other vessel, and the vessel with her canvas on had her wheel lashed, or kept no man at the wheel, and during the night they drifted,

and about daylight in the morning, say on about August 9th (you know about when daylight occurs then), these vessels were within three or four miles off the dock on the south end of the South Fox Island, what would the drift of those vessels indicate the direction of the wind to be during that time? You are familiar with both places.

A. Yes, sir. About north by east, or most east.

Q. It would not be to the westward of north?

A. It would not seem so from that drift.

Q. (Presenting diagram to witness.) About four miles west of the light?

303 A. Yes, sir; they must have gone pretty close to the Little Fox.

Q. The distance from about four miles to the westward of Beaver light to the South Fox is about how far?

A. It is not far from 12 miles.

Q. If the American Union and the Osborn were lashed together, the Osborn being loaded and the Union light, as indicated in the last question, and were lashed together a little after 12, say half past twelve, on the night of the 9th or 12th of August, and they drifted down to the south end of the South Fox, getting there about daylight, drifting that distance in that time, what would that indicate in regard to the breeze?

A. It would indicate a pretty strong breeze. They would drift pretty fast.

Q. About how many hours would darkness be then from half past twelve?

A. Hardly four hours; not over that at any rate.

Q. They would not drift that distance under a light wind, would they?

A. No, sir.

Q. So that the wind, in your opinion, must not only have been north and north of east, but a strong wind at that?

A. Yes, sir; it must have been a strong wind to take them along that distance—nearly three miles an hour; nearly as fast as a man would walk.

Q. If a three-and-after has the wind at dead aft, would it be a real advantage to her to carry her mizzen?

A. No, sir; a detriment.

304 Q. How so?

A. Small sails break the wind on your large sails; keeps them all the time shaky, and swings them.

Q. A tendency to keep her from her course?

A. They do not steer so well; you lose by it; you do not get so much canvas to pull.

Q. Get the wind on your mainsail and foresail?

A. Oh, yes; the larger sails frequently take in the small sail.

Q. Have you ever been on a three-and-after at Sand Bay wind-bound, or Beaver Island?

A. Yes, sir; a good many times.

Q. What would be the usual course by the master of a three-and-after if he were lying at Sand Bay and desired to go to Green Bay, say that the wind was about north, and he wanted to get under way, say at night, about nine o'clock? Describe to the court what he would do when he hove his anchor up.

A. The first thing I would do would be to heave up my anchor and

then get on my foresails. If I had square sail I would get that on first, and then get on the foresail, and then the mainsail; no hurry about the others; they are not of any use unless the wind lays off the quarter. If the wind laid right aft I would not want the mizzen.

Q. Steering from Sand Bay to go around Beaver light, about what course do vessels usually steer?

A. If you are close in the bay you have to go about south by east, then go south by west, and then southwest, and then west-southwest.

Q. Go along the island, I mean?

A. The course you would make most of the way would be about south.

Q. Suppose two vessels the size of the Union and the Osborn, and of the same class, one being heavily laden with iron ore and the other being light, lashed together, and one having all her canvas except the mizzen (that is the Union), drifting, and no one at the wheel, the wheel lashed, would those vessels drifting make more headway than leeway?

A. Well, that is a pretty hard question to answer. I should calculate they would make about the even thing. They would be up in the wind as much as they would be off. I think they would lay to and drift right over, fall off sideways. That would be my natural supposition unless there would be a sea to keep them off. Get the sail so it don't pull out and take any vessel loaded up in the lake, and get them up in the wind, and they keep up in the wind. They won't steer themselves. Light vessels you might, with a light sale, take the rudder off, and they keep going along all the while.

Q. Is there any current that prevails there that would effect the drifting of those vessels?

A. I have seen a current there. I don't know but I may say three miles an hour. I had about abreast of the light-house to make several stretches to get past.

Q. With the wind north?

306 A. For instance, with a west wind.

Q. The current runs different ways?

A. Well, the island is long; it is twenty miles long; around the end of the island you get your current; as soon as you get off into deep water you lose that current.

Q. Would the current effect the drifting of those vessels?

A. It would whatever way it was; a wind blowing from the south, and a vessel lying there with a headway, when the wind shifted the tendency would be to drift southward.

Q. If the wind blew from the north?

A. As soon as the water gets back from where it was blown before it stops. It takes but a short time.

Q. If two vessels as we have described them were drifting at the place indicated from a point about four miles west of Beaver light, and the wind was then northwest by north, which way would they drift?

A. They would drift over to the eastward.

Q. Would they drift down close to the South Fox?

A. Not if they drifted with the wind. (The witness explained by means of the model.) It would be about eight or ten miles from where they are.

Q. More to the eastward?

A. Yes, sir.

Q. A strong wind for hours from many points causes quite a sea?

A. Yes, generally; when the wind has been blowing from the south

heavy for a day or so you will have a sea rolling down across there for twenty-fours after. If the wind comes from the other way you will have two seas.

307 Q. How does a heavy head-sea affect a light vessel?

A. If you are along with the wind, with a heavy head-sea, a light vessel will fall off more than a loaded vessel. Every time they raise up they drift off.

Q. Much harder to keep in the course?

A. Oh, yes; they have less hold in the water.

Q. It is usual for vessels lying at Sand Bay, on account of a head wind in the summer time, to leave the bay before she can make her course good?

A. That is a pretty hard question to answer. There are different kinds of men. Some men may wait till all the wind dies away to ship, and others till the wind drives them out, and others leave as soon as the wind begins to drop a little.

Q. What kind of a wind would a northeast be for a vessel from Sand Bay bound for Green Bay?

A. Good wind, north-by-east wind; they would sail right on the island—well, north by east they would; you would have to go south by east to get up there. Yes, you would have to run close by land, and I do not know as it would run you clear then.

Q. I understood you to say that if the Union had the wind dead aft, it would be better to have her mainsail and foresail than her mizzen?

A. One sail aft; another small sail will break the wind; you do not get any force on it. By taking in your mizzen you let your large sail get the wind. One of the most disagreeable winds you get is a wind right aft by night.

Q. Then you would not call it bad seamanship for a three-and-308 after on a dark rainy night, suppose she was lying at Sandy Beach Bay, and bound for Green Bay, and the wind were north by east, to get under way and come out there, and not set her mizzen until she got down by the light?

A. No, sir; I should not. I would call it good—be doing work for nothing.

Q. Is it necessary to have all hands to set the mizzen in such cases as that?

A. No, sir; it is not, unless they have not got a full crew.

Q. It could be set during the watch after they got under way?

A. Oh, yes.

Q. How is it in regard to keeping their course—vessels on a dark and boisterous night? How does a loaded vessel compare with a light one?

A. Not much difference; they are both very fine steering vessels; no better steering vessels, I suppose, on the water than either one of them.

Q. What kind of running trim would you say that such a vessel as the American Union would be in, when light, the wind free, if she were carrying her three jibs, foresail, fore and gaff topsail, and her reef mainsail, and did not carry her mizzen?

A. Good trim; easy to handle.

Q. What kind of trim would you say she would be in if she were light and close hauled; had her sheets flat aft; were sailing within five points of the wind, and had only that canvas on?

A. Well, it would not be very good. I do not know of any one that would have that kind of a canvas on in that kind of a wind.

Q. It would not be good seamanship to have that canvas?

309 A. If they were disabled, her sails torn, and she could not have any other canvas, it would be well enough; she would need it.

Q. She needs her mizzen when she is by the wind?

A. Yes, sir, and mainsail, too; all the after-sails she has got. Light vessels want all their after-canvas.

Q. Well, in an eight-knot breeze would a three-and-after carry all her after-canvas—such as the Union? The breeze would not be too strong, would it?

A. That breeze would be a strong breeze for her. She is a very fine sailing vessel. There are very few vessels that are her equal to sail.

Recess until 2 p. m.

2 p. m.—Direct examination of Capt. George Judson resumed:

Q. If a heavy sea were running from the westward and a three-and-after, when light, were headed west, with the wind northwest by north, being only within five points of it, how much leeway would she make going from Beaver Island to Green Bay? What kind of a course would she make?

A. That is owing a good deal to the degree of wind you got.

Q. Eight-knot breeze.

A. Eight-knot breeze, with a heavy sea? She might make not much better than a west-southwest course. That would be a good course for her to make. With a good sea on they fall off. Sometimes you can hardly make them hold their own. When they strike a sea they stop, and they drift off before they get going again.

310 Q. On these three-and-afters when the mizzen is lowered away it usually lays on the cabin, don't it?

A. Yes, sir.

Q. Is it necessary to roll it up right off?

A. Oh, no; sometimes stop the gaff on top of the beam so it won't swing, or anything of that kind.

Q. Immediately after two large vessels like the Osborn and the Union collide, and where the spar of one is carried away, is it usual to lower away the mizzen and to stow it before it is known whether either of the vessels will sink, or whether any one is killed or injured on board?

A. I could not say as to that. Some men do a thing in haste, or by being frightened. They might not know what they are doing. There is no regular rule to tell what a man might do. If he wanted to keep his vessel up to the wind he might take in his headsail, and if he wanted to take the vessel away from the wind he would take in his gaffsail.

Q. When a vessel is running free they keep her sheets slacked off?

A. They haul them off.

Q. Which sheets are slacked the most, the fore or aft sheets?

A. Aft.

Q. When a vessel is by the wind in hard weather she can carry the mizzen as long as she can carry the other sails?

A. She got to have that. That is the last sail.

311 Q. By the wind?

A. Yes, sir.

Q. How would a vessel steer if she were deeply loaded, say on a dark night and no stars, together with a seven or eight knot breeze, if all her sheets were flat aft and she had the wind a point and a half abaft her beam?

A. She would be carrying a pretty stiff weather wheel.

Q. A. loaded vessel would not, with the wind free, have her sheets in that way, with the wind a point and a half abaft the beam?

A. No, sir; in keeping her sails straight she would not.

Q. In sailing from Green Bay for the straits does the vessel hug the Fox Islands very close at night, or give them a wide berth?

A. Have to keep pretty well off from the South Fox. There is a reef runs along there.

Q. Give them a wider berth at night than daytime?

A. Yes, sir.

Q. Dark night?

A. Oh, yes; you can run very close to the North Fox.

Q. If a light vessel, with the wind free, having all her headsails set, her mainsail reefed, and her mizzen in, discovers a vessel meeting her, end on, a point and a half on her lee bow, in what distance could that vessel, having her wind free, pay off and clear the vessel she was meeting?

A. The wind eight knots an hour?

Q. Yes, sir, with the wind free. In what distance could she change her course?

312 A. She could change her course in running about her length.

You have got to go a certain distance before your rudder takes effect in the water. Vessels ought to be at least four lengths from each other to successfully go clear, unless they are prepared to do it.

Q. I mean, supposing in this case that the vessel having the wind free makes the movement, and only she?

Q. They could go clear 3,000 ft—2,000 ft; not much less than 2,000 ft, if the other vessel does not make any attempt to get clear. Take well on to 2,000 ft. In going 16 miles an hour you are going very rapid. It is a great speed. Each one is making their eight miles.

Q. Do you know anything about when these winds blow on the lakes here for a number of hours strong 8 or 10 knot breeze, from what points, if any, do they usually blow, winds of that strength and duration?

A. We get them from all points.

Q. Do they principally from the cardinal points—north, or northeast, or northwest?

A. Generally when it has been warm we get the wind from the north pretty fresh. Our prevailing winds on Lake Michigan are generally from the west and southwest.

Q. They are more from the west and such point?

A. West and southwest more than from most any other direction. South makes the heav'est sea—south and southwest.

313 Q. (Presenting models to witness) Suppose that those vessels were meeting, and that this vessel (indicating) is heading east by north half north, and the white vessel is headed west, and no change is made in their course until they collide, what parts of those vessels will come in contact?

A. Where their ends came together?

Q. Yes, sir.

A. The vessel going east would be either hit on her starboard bow and the vessel going west would either strike her on her starboard bow or be hit on her starboard bow.

Q. That is, the starboard bow of the vessel going west would strike the starboard bow of the one going east by north half north?

A. This vessel going east by north half north, if she run on this ves-

sel at all, would have to hit her on the starboard side, and be hit on the other side.

Q. Well, if two vessels were meeting end on, or almost dead ahead, and this white vessel we will suppose struck on the port side of the black vessel, would that indicate how they were meeting; whether they were crossing?

A. If they hit as they now hit, coming direct on, they would both hit on the port bow; if they hit dead on they could hit on either bow so as the stern got clear; if the stern got clear they could both hit on the same bow, both on the port or both on the starboard bow.

Q. If a vessel is going east by north half north, and a vessel strikes her on the port bow, what course must that vessel be pursuing when she strikes it? Heading how?

314 A. She would have to be headed about an opposite course to the other vessel, not less than west half south.

Q. Captain, when you order a man to the wheel to steer, and tell him to steer full and by, does that indicate that he shall keep her by the wind whether it varies or not?

A. When you tell a man full and by it means keep close haul on the wind; that is, as near as he can get and have the vessel go on.

Q. He is to keep her by the wind no matter how the wind changes?

A. Yes, sir.

Q. If you are going to the westward, and you order the man at the wheel to keep her full and by, does that indicate she is going to any particular point of the compass while she is going full and by?

A. It indicates go where her head-wind drift would take her; it is no particular point, from the very fact you got to have the drift.

Q. It does not indicate that he is going either west by south or west by north?

A. Yes, sir, it does; it indicates where he does go; that is, where he does go is where it is indicated.

Q. My point is this: suppose you tell a man to steer the vessel west, then he has to keep her west; suppose you tell a man when you send him to the wheel to steer full and by?

A. That may make her a west course.

Q. But not necessarily?

315 A. Oh, no; he will frequently tell you it is breaking her off to the southwest, and in a little while he may tell you it is headed west to the north.

Q. It is full and by all the time?

A. Yes, sir, that is what it is; for to keep her close to the wind all the time and not lose anything.

Cross-examination by H. L. TERRELL:

Q. Captain, with a beam-wind I suppose the mizzen is the proper sail to carry it?

A. Yes, sir.

Q. And when it is headed full and by, the wind is stead' and the course is steady?

A. Yes, sir.

Q. Then, if you know where the wind is you know where her course is?

A. Yes, sir; you tell a man to keep west and he will keep there until the wind breaks him off, and he will tell you of it.

Q. Suppose you wanted to make west and you could just about make it by sailing full and by, is full and by an ordinary order?

A. We do not generally tell a man full and by. If we want to steer a west course and we can steer it we are never afraid to go off; when we want to change we can get off if the wind is ahead, and you can't lay your course, or can lay your course; when you tell a man to keep full and by it is in order to keep a sharp lookout where the wind is;

316 Q. If there is any difficulty in laying the course, you give him the order full and by?

A. Yes, sir; the minute you get so you can't keep your course, full and by.

Q. Did you ever tow the American Union?

A. No, sir.

Redirect examination:

Q. I think you stated already that a vessel would make a point or two leeway going over there.

A. It is according to how much sea you have.

Q. The American Union and such three-and-afters do not sail closer than five points to the wind, do they, ordinarily?

A. No, sir; it takes a pretty fine vessel to sail inside of five points; they do not have any around here that do it with any sea on.

Q. Those that do it run by steam?

A. Yes, sir.

Q. If the wind were northwest, could the American Union on her way from Beaver Island to Green Bay and by the wind sail directly west?

A. No, sir.

Q. With the leeway there, how much would she be from west?

A. She would be about two points.

Q. They would give her five points to sail in and one point leeway?

A. They cannot make five points and not count leeway; that is very good sailing. In very smooth water in daytime, when you can see everything, sometimes you can make inside of six points a little, but not much.

317 GEORGE STONE, a witness called on behalf of the defendant, being first duly sworn, was examined in chief by Mr. CONDON, and testified as follows:

Q. What is your business, captain?

A. Well, I follow the lakes.

Q. How long have you followed them?

A. Since '44.

Q. Been a master of a vessel how long?

A. Since '48.

Q. Been on steam as well as sail vessels?

A. Yes, sir.

Q. Been on sail-vessels how long?

A. Twenty years, I guess.

Q. You have lain at Sand Beach Bay, near Beaver Islands, frequently with vessels?

A. Yes, sir.

Q. State from your experience as a mariner or officer of a vessel for that term of years what, in your opinion, is the proper place to have the lights on a three-and-after, whether at the mizzen rigging or forward.

A. My opinion is, and always has been, the hind end of a vessel is not the place to carry a light. In the first place, my recollection is

that they have to be carried to be seen dead ahead, and I say they cannot be carried at the mizzen and be seen dead ahead.

Q. If a vessel tumbles in aft she is wider forward and at the main-rigging, say, five feet?

A. It would be more difficult to see it.

Q. From a position dead ahead it would be impossible?

318 A. No, sir; you cannot see it; that is my experience. I have seen, I guess, five that I have crossed their bows, and it would be some seconds before I could open up their light, and they carried them back on the other quarter.

Q. In the rigging, in case a vessel lists, the booms interfere?

A. Yes; the more they list over the more they hide the lee light.

Q. Captain, here is a chart showing Beaver Island and the two Foxes. There is a green and a red mark indicating the place where the collision is said to have occurred between the Osborn and the American Union, stated to have been four miles to the westward of Beaver Island light. Do you know the Osborn and the American Union?

A. Yes, sir.

Q. Now, suppose that a collision occurred there between these two vessels, the Osborn were deeply loaded and the American Union were light, and the two vessels were lashed together, the stern of one to the bow of the other, and the American Union kept her canvas on except her mizzen, and her wheel was lashed, or no attempt was made to steer, and they were in that position at half past twelve o'clock at night on the night of the 9th of August, and in the morning about daylight these vessels were from three to five miles off from the south end of the South Fox, would that indicate the direction of the wind during the night, and, if so, what direction would you say the wind was?

319 A. I should suppose it would be from the northward. I do not suppose you could tell within a point or two points exactly. That would be owing a good deal to how the vessels would be lashed together. If the American Union was on the weather side, her head being to the westward, she would work naturally to the westward a little. If she was on the other side she would work the other way. They would not be able to drift exactly off from the wind. The more the wind was to the eastward the more she would work to the westward.

Q. If the wind at the time these vessels were lashed together were northwest by north where would they drift?

A. I should suppose they would come down here in the mouth of the bay. (Indicating.)

Q. In an opposite direction to which they did?

A. Yes, sir; not exactly opposite, but a difference of four points any way.

Q. Captain, what kind of running trim would you say a vessel was in that was light, say one the size of the American Union, having the wind free, if she were carrying three jibs, foresail, fore gaff-topsail, and a reefed mainsail, and was not carrying her mizzen?

A. I should think that would be the sail she would carry, running free.

Q. If she were by the wind, close hauled, what sail would she carry in a seven to eight knot blow?

A. Do you mean to make a vessel pass eight knots or the wind blowing eight knots? The velocity of shore wind we call an eight-knot breeze when we can make eight knots with the vessel.

Q. Suppose you were making eight knots with the vessel?

320 A. I suppose she would want her mizzen and all her lower sails anyway.

Q. The mizzen is a very useful sail on a wind?

A. I have always valued it so when I have been on a three-and-after, when I am by the wind.

Q. What assistance do you derive from it when you are by the wind?

A. It enables you to right your wheel midships, whilst the other way you have to carry your wheel way down, and the vessel go off sideways. I am speaking now of a light vessel.

Q. How would a deeply-loaded vessel steer on a dark night with a quiet sea and seven and eight knot breeze, if her sheets were flat aft and she had the wind say a point and a half abaft the beam?

A. Well, I never trim sails in that way. I do not know how she would work.

Q. She would not work at all, would she?

A. I do not believe she would. I never undertook to trim a sail in that shape.

Q. It would be rather dangerous navigation, would not it?

A. In an eight-knot breeze it would not, but I do not believe the vessel would handle in that shape. It would not be dangerous.

Q. What sails do they usually get on first, say in a vessel laying off Sand Beach Bay, with a northerly wind, bound for Green Bay?

A. There are just about as many different ways about getting under way as there are minds to men. Some men will go to work and
321 get everything on to them; some will play up and go on; get on their headsails and go along; usually get up the foresail and mainsail, and then get under way with that, and then go along if the wind is free.

Cross-examination by Mr TERRELL:

Q. Which has the most to do with the direction in which a vessel drifts, the sea or the wind?

A. Do you mean now a vessel under way?

Q. No; these vessels lashed together that are drifting.

A. The wind, with the canvas on the other vessel, I should suppose would have the most to do with it.

Q. The wind would do the most?

A. Yes, sir; I suppose it would.

Q. In other words, you think that the canvas on a vessel would make the vessel make headway more than the sea would draw her off?

A. Just as I said before. If they were lashed together it would be so.

Q. Suppose the vessel that had the sails up was the windward vessel, so that her sails would pull, what direction would she go; would she run off before the wind, or would she drift with the sea?

A. I never saw a vessel fixed in that shape; I would have to give my opinion. I should suppose it would make a difference of two points to head off the wind.

322 CORNELIUS REWELL, a witness called on behalf of the respondents, being first duly sworn, was examined in chief by Mr. CONDON, and testified as follows:

Q. What is your business, captain?

A. I follow the lakes.

Q. How long have you followed the lakes?

A. I followed the lakes thirty years.

Q. Been master of sailing-vessels how long?

A. 20 years, I guess.

Q. Been employed any on steam-vessels?

A. Yes, sir.

Q. As master?

A. Yes, sir.

Q. How long?

A. Three years.

Q. Did you know the American Union and the schooner S. S. Osborn in 1872?

A. I did, sir.

Q. Did you see the schooner S. S. Osborn, in Cleveland after that collision?

A. I did, sir.

Q. How soon after she arrived here?

A. She arrived somewhere in the night, or in the morning before I got down from my house for my vessel; she was in the creek when I got down here.

Q. Did you go aboard her?

A. No, sir; I was on the deck alongside of her.

Q. Did you notice the position of her main-boom at that time?

323 A. I did, sir.

Q. Did you notice the position of the sheets to it?

A. The sheets were fast to the boom in the usual way.

Q. How did the boom lay?

A. It lay about a third of the way from the mizzen-riggings to the mizzen-mast; about where we generally carry our rigging by the wind; we would call it our sails trimmed by the wind.

Q. Did you notice her mizzen-boom?

A. I did not, sir.

Q. From your knowledge and experience as a master, state whether, in your opinion, it is a safe and prudent place on three-and-afters to carry their lights at the mizzen-rigging?

A. I don't think it is.

Q. Why?

A. It cannot be seen dead ahead.

Q. Supposing that a vessel is from four to six feet wider forward than where the lamps are carried?

A. That makes it worse still.

Q. Where should such a vessel carry her lights?

A. I always carry mine forward. I consider that as the best place, where they can be seen by vessels?

Q. They should be carried so on all vessels.

A. Yes, sir; where they can be seen to the best advantage. I have carried my lights aft by the mizzen-rigging. I say this just to show I was on one vessel where I lost these lamps; but ours was a square-sail, and that knocks lamps about a great deal. I thought I would try to carry my lamps somewhere else; I got them aft, forward of the mizzen-rigging; I carried them there a couple of trips; I did not

324 know better. I was coming down the river once in tow of a tug and we stopped in the river to get wood; the tug did, and I wanted wood myself. It was in the night and I got in a boat with my men to go ashore to get some wood, and got right ahead of my vessel, and I knew the lights were burning, because I had just left them, and I could not see them, and when I got on dock I could not see my lights at all. It was lying right dead ahead. That was the length of my tow-line. I do not know how long my tow-line was; it was, may be, 400 feet.

Q. How long was your vessel?

A. It was 200 feet. I concluded then that was no place to carry my lights, and I put them forward again and run the chance of losing them. I thought I would rather lose my lamps than run the risk of a collision.

Q. Could not you shorten your square-sail so as not to interfere with the lamps?

A. Yes, sir; the square-sail sheets since that we carry our lamps forward by the bowsprit, and there is no trouble, at least I had no trouble; I never lost one forward.

Q. Captain, is it usual for vessels when light, three-and-afters, in an eight-knot breeze, to be by the wind with her mainsail reefed and without any mizzen?

A. I should not think it was; I never had a vessel yet would do much that way.

Q. Cannot keep her within five points of the wind without a mizzen?

A. Not well.

Q. How would she steer?

A. She would not steer at all.

325 Q. How is it in regard to not having a mizzen when you have the wind dead aft?

A. We generally take that in to get the wind on the other sails. It is more harm than good then.

Q. To have it on?

A. Yes, sir.

Q. Captain, if a collision occurred about four miles to the westward of Beaver light, say about twelve o'clock on the night of the 9th of August, between such vessels as the Osborn and the American Union, and one were light, with canvas, and the other loaded, without canvas, and those vessels drifted during the night, and in the morning, when daylight appeared at such time of the year, they were within 3 to 5 miles of the south end of the South Fox Island, what was the direction of the wind, in your opinion, while they were drifting?

A. Well, I should think the wind must have been to the eastward of north to drift from the head of the Beaver down here. (Indicating on diagram.)

Q. About four to five miles westward of the light?

A. I should think the wind must have been north or eastward of north.

Q. That would be drifting pretty fast for those vessels that distance?

A. I should think it would.

Q. About four hours' time?

A. Yes, sir.

Q. Must have had a good breeze?

A. I should think so.

Q. If the wind was northwest by north, would the vessels drift in that direction?

326 A. I should think not.

Q. How would they?

A. More toward Grand Traverse Bay I should think.

Q. Have you any doubts of that?

A. No, sir; I know they would; that is, if there is no current to obstruct them. With the wind 8 knots you could not get current enough to get up to Fox Island, wind northwest by north.

Q. Two vessels lashed together in that way, and the wheel lashed or no one attending to it, would they naturally drift before the wind?

A. Yes, sir; they would drift before the wind. Their sails would forward them ahead some; sometimes the sails might forward them ahead and then they might turn around and get in the trough of the sea, and they would drift right back again. I could not tell where they would drift, because I never saw two vessels in that shape.

Q. If the stern of one were lashed to the bow of the other, would that affect the drifting any—that shape affect the headway some?

A. Well, I guess they would not go right dead to the leeward, because the canvas, as I said, would forward them ahead some, but not much.

Q. Well, if the wind were north by east, and these vessels lashed together in that way, and they forged ahead some while drifting, how would they drift, admitting that they did forge ahead some. If the wind was north by east, and they did not forge ahead any, they would drift how?

327 A. They would drift south by west, but they would naturally forward ahead a little with the canvas.

Q. How much would they forge ahead naturally?

A. In four hours?

Q. Yes, sir; would they drift any east of south?

A. I do not know whether they would or not. I never saw vessels in that shape; that is a thing we are not much more posted in than yourself, because there is not one in ten ever saw a vessel in that shape?

Q. You have laid in Sand Bay often with a three-and-after, have you not, captain?

A. Yes, sir.

Q. What is the usual course adopted for getting out there if you are bound for Green Bay?

A. According to how the wind is.

Q. If the wind is north by east?

A. That depends whether there are more vessels there than yourself?

Q. If you are unembarrassed by other vessels being in your way?

A. As the others said, there are many men of many minds; some men would heave the anchor before they would touch the canvas at all; when they got the anchor up get the foresail and rest of it on.

Q. With the wind north by northeast the course is south by south-east?

A. Yes, sir; around the island.

Q. Is it usual to put the mizzen on?

A. No, sir.

Q. Will a light vessel, by the wind, in an eight-knot breeze and
328 some considerable sea, make leeway going over from Beaver Island to Green Bay?

A. Yes, sir.

Q. About how much?

A. Make a point to a point and a half. There is a difference in vessels; some make more leeway than others.

Q. A north wind or north-by-east wind would be a favorable wind to get out of Sand Bay, would not it?

A. Yes, sir.

Q. Supposing that a three-and-after were leaving Sand Beach Bay on a dark night, and she was bound for Green Bay, and the wind were north by east, would you say it would be bad seamanship for her to sail without her mizzen until she would reach Beaver Island?

A. No, sir; I would not say it was bad seamanship.

Q. Good seamanship?

A. Yes, sir.

Q. What kind of running trim would such a vessel as the American Union be in, when light and the wind free, when she were carrying her three jibs, foresail, fore and gaff topsail, and her reefed mainsail, and did not carry her mizzen?

A. She is in good trim; that is, if they are not in a hurry.

Q. Well, with the wind free, eight-knot breeze, would not that be a good trim for her to sail in and sail well?

A. I should have reefed the gaff-topsail, I think, and put the main topsail on, I think, and may be the mizzen.

329 Q. If the wind were dead aft would you have your mizzen on?

A. No, sir.

Q. Captain, how would a deeply-loaded vessel—a three-and-after—steer on a dark night, with a seven or eight-knot breeze, some considerable sea, with her sheets flat aft, carrying all her canvas, if she had the wind, say, a point and a half abaft the beam?

A. I could not steer well I guess.

Q. Did you ever see a vessel sail that way?

A. No, sir.

Q. What would be the trouble?

A. She would carry her rudder right across her; could not keep her out of the wind. That is what is termed "hard up."

Q. If a light vessel, with the wind free, having all her headsails set, mainsail reefed, and carrying no mizzen, in going about eight knots an hour, discovered a vessel dead ahead of her, a point and a half on one of her bows, how soon could that vessel that is light, moving at the rapidity stated, get out of the track of the vessel she is meeting? How many lengths of her would she have to run before she could change her course so she could avoid a collision?

A. Which bow is the light one, the weather one or the leeward?

Q. Say a point and a half on the lee bow, eight-knot breeze, free?

A. Do you mean how far she would have to travel before she could luff clear or get off clear? In an eight-knot breeze she could luff in about four or five times her length, but if she had the mizzen on she could luff a good deal quicker; she could luff quicker with a mizzen if she got in close quarters.

Q. A mile off be any trouble in keeping off?

A. Going 16 mile an hour, both of them?

Q. Say about 15 miles an hour; 14 or 15 miles an hour?

A. It don't take long to go a mile. I do not know whether you could keep off in time or not.

Q. If you were on a three-and-after that is light, and had all her sails set except the mizzen, the mizzen gaff, the main gaff-topsail, and when, say 10 or 15 minutes before the collision occurred, you saw a vessel dead ahead of you, or say a point and a half on your lee bow, would there be any difficulty in changing your course?

A. Which light did they see?

Mr. TERRELL. The green one.

A. Then I think I could keep out of her way.

Mr. CONDON. If you had two miles space to do it in there would be no trouble, would there?

A. No, sir; I think not.

Q. If you had your mizzen on you could luff in half a mile?

A. He says the green light?

Q. Yes, sir.

A. Well, I would have to cross his bows then. If I saw his green light I could keep out of the way of it, and turn the wheel starboard.

Q. If two vessels are meeting, one going east by north half north, and the other west, and continued on this course, what sides would come together?

331 A. The starboard sides.

Q. Of each?

A. Yes, sir.

Q. If two vessels are meeting and their port bows come together, the jib-boom of one right over the port side of the other, what would that indicate in regard to how they are meeting, whether they are crossing or meeting dead ahead?

A. I do not understand that question.

Q. I will ask you this question: If one vessel is going east by north half north, and the other vessel strikes her on her port bow, the jib-boom comes in on the port bow, in what direction must that other vessel be going?

A. This one going west? (Indicating.)

Q. The one going east by north half north.

A. The other must be going west by south half south.

No cross-examination.

MERVINE THOMPSON, a witness called on behalf of the respondent, being first duly sworn, was examined in chief by Mr. CONDON, and testified as follows:

Q. What is your business, Mr. Thompson?

A. Sailing.

Q. How long have you sailed?

A. About 21 years.

Q. During that time how much of it have you been an officer of a vessel?

A. About 11 years.

Q. How long have you been on sailing-vessels?

332 A. That has been my business, sailing-vessels altogether.

Q. Do you know the American Union and the schooner S. S. Osborn; did you in '72?

A. Yes, sir.

Q. Captain, state from your knowledge and experience as a mariner what is the proper place for a three-and-after to carry her lights that they may be visible dead ahead?

A. Carry them forward.

Q. What objections are there to such a vessel carrying her lights at the mizzen-rigging, on the rail?

A. There are quite a number of objections; they are so narrow aft most generally, on account of the sails hiding the one light—the lee light.

Q. When the vessel lists over?

A. Yes, sir; they are narrow in the stern generally.

Q. Vessels are?

A. Yes, sir.

Q. Captain, is it usual to sail vessels by the wind close hauled without carrying the mizzen?

A. No, sir.

Q. Have you ever seen it done?

A. I don't know that I ever have.

Q. It is usual to carry the mizzen by the wind ?

A. Yes, sir.

Q. How is it in regard to carrying the mizzen when the wind is dead ahead ?

A. Quite often take it in and roll it up altogether.

Q. Full mainsail and foresail and other headsails is all you want ?

A. Yes, sir.

333 Q. Here is a chart showing Beaver Island and Fox Islands.

Suppose two vessels, the size of the Osborn and American Union, were lashed together, about half past twelve o'clock at night, on the ninth of August, about four or five miles westward of Beaver Island light; that the vessel the size of the American Union carried all her foresails, and had no mizzen, gaff-topsail, or main gaff-topsail, and the stern of the vessel the size of the S. S. Osborn, deeply loaded, were lashed to her bow, both vessels lashed together, and that in the morning they were within 3 to 5 miles of the south end of the South Fox, what direction would you say the wind been there during the time they were lashed together ?

A. I think in the neighborhood of north somewhere. I cannot tell exactly where it would be. Probably somewhere in the neighborhood of north.

Q. If it varied any would it be to the westward or eastward of north, in your opinion ?

A. I would not be able to say. I should think that the drift would be somewhere in the neighborhood of the north. I would not say whether it would be west of north or east of north.

Q. Would it vary more than a point either way ?

A. I could not tell.

Q. If the wind wore northwest by north during the time that these vessels drifted would they drift down to that place ?

A. No, sir.

Q. Where would they drift ?

334 A. Down in Traverse Bay, over to a point near Little Traverse Bay.

No cross-examination.

Council for respondent read in evidence the depositions of the following-named witnesses:

James O'Niel, William Price, Capt. John French, William Seamans, S. Lampoh, J. H. Andrews, Albert S. Outis, E. S. Outis, Edward Ingraham, and Charles O. Ingraham, Peter Bondy, and Sylvester Smith.

Also offered in evidence the affidavits of Robert Mott, George Magley, Thomas G. Gilkison, Robert and F. Parsons, separately, and an affidavit by the crew of the American Union, consisting of the following-named persons: Charles O. Ingraham, Edward Ingraham, Eliphallet Outis, Albert S. Outis, Thomas G. Gilkison, George Magley, Robert Mott, and Frank Wicks, certified to by F. O. Clark, notary public.

(Objected to by H. L. Terrell, proctor for libellant.

Received subject to exception by respondent.)

C. B. BEACH, a witness called on behalf of the respondent, being first duly sworn, was examined in chief by Mr. CONDON, and testified as follows:

Q. Is your name Christian B. Beach ?

A. Yes, sir.

Q. Where did you live on the 21st of August, 1872 ?

A. Cleveland.

335 Q. Where was your office at that time?

A. Willey, Terrell and Sherman, I believe, or Willey, Cary & Terrell at that time, in 1872.

Q. Do you remember having had a protest entered before you on or about that time by the crew of the schooner American Union?

A. I remember such a protest. I cannot say anything as to the time. I have no means of fixing it.

Q. You were a notary public at that time?

A. I was, I believe.

Q. Where is the original protest, as sworn to before you?

A. I have no idea, sir.

Q. Where was it when you last saw it?

A. Well, I cannot say as to that. I do not remember when I did last see it.

Q. Had you taken many protests before that time?

A. Several, I believe.

Q. Did you retain the original in your possession?

A. No, sir; not strictly so. I filed them with the papers, I believe, generally in the office; constructively in my possession.

Q. What papers—your own papers or their papers?

A. Papers in the case; probably office papers.

Q. You, as notary, did not retain the original protests that were made before you?

A. I did not retain them in my immediate possession.

Q. You kept them there in your office among the other papers in the case?

A. Probably that is the case. I do not remember the circumstances in this or any other.

Q. Do you know where that original protest is now?

A. I do not.

336 Q. Have you made any inquiries lately to ascertain where it is?

A. No, sir; I don't know that I have ever inquired in regard to it or looked for it since that Mr. Vorce spoke to me about it.

Q. When was that?

A. It was some time ago; it was possibly two years ago.

Q. He asked you to look for the original protest?

A. He asked me where it was, and I told him I did not know; probably in the office.

Q. Have you made any inquiries of Mr. Terrell, or any one connected with the office, in regard to it?

A. No, not since then, I guess.

Q. Did you make a copy of that protest for Prentiss and Vorce, or any of them?

A. I seen that paper (referring to copy of protest), and that is in my handwriting.

Q. How much of it is in your handwriting?

A. I guess all of it that appears in writing there.

Q. Please examine it so it is not necessary for you to guess. (Handing copy of protest to witness.)

A. Well, I have to read it over very carefully. (Witness reads.) That writing is all mine, sir.

Q. Who drew up that protest?

A. What do you mean by that? Who wrote it out?

Q. Yes, sir.

A. I suppose I did.

Q. Who dictated it?

A. Well, that is not entirely clear in my mind.

Q. Who were present when it was drawn?

A. I cannot tell you that.

337 Q. Was it drawn in Willey, Terrell and Sherman's office, or Willey, Cary and Sherman?

A. Yes, sir; it was drawn over there.

Q. Was Mr. Terrell present when it was drawn?

A. I do not know.

Q. Was Capt. Parsons there when it was drawn?

A. Is he the captain of the American Union?

Q. Yes, sir.

A. Well, I am not positive as to that either.

Q. From whom did you derive the information that is stated here in regard to this collision written out by you?

A. I cannot tell except as it appears upon the document there; I may have received it from Parsons or from all together; I cannot tell you how that was. I did not burden my mind with it at the time, and hardly thought of it since; that is, to recall any of the facts in the case.

Q. Did you know any of the parties that signed the protest?

A. I never seen them before they made the protest. I believe I seen Parsons sometimes since then; frequently.

Q. Were you acquainted with the man who signed his name here with a mark?

A. I was not, sir.

Q. Don't know whether in fact that was his name or not?

A. No, sir.

Q. Did all the parties whose names are attached here sign at that time, or only a number of them; do you remember?

A. I do not.

Q. What was your habit in regard to certifying documents purporting to be signed by parties?

338 A. What was my habit, or what is?

Q. What was.

A. Do you mean whether I did it regularly or irregularly?

Q. I want to know your habit.

A. I suppose when a paper was executed before me, in my presence, I witnessed it.

Q. Was it your practice, in having parties sworn before you, to read the paper over to them?

A. I think it was undoubtedly my practice. I know it would be very wrong if it was not. It may be that all the parties were not present at the time, but when they did sign it it was certainly read over to them. It is possible they were all there. It was a paper of that kind that I was frequently called upon to draw up, and it made no impression upon my mind, so I do not remember.

Q. It was rather an important document, was not it?

A. Certainly; we had a great many important documents.

Q. You are certain that you read it over to these parties before you signed it?

A. I am not certain as to that either; I probably did if I certified to it.

Q. Were you in the habit of certifying to things you did not do?

A. No, sir; I was not.

Q. This being in your handwriting, and certified to by you, is correct?

A. Undoubtedly, sir.

Q. You do not swear that this is a copy?

A. No, I do not.

Q. Who did you furnish this to?

339 A. I cannot tell you. I suppose it was either Mr. Varce or Mr. Prentiss.

Q. Do you remember whether it was soon after it was drawn up?

A. I do not.

Q. Do you know what they asked you to do when they demanded this of you?

A. Well, know, I do not; accurately speaking, I suppose they wanted a copy of the protest.

Q. Did you make them a copy of the protest?

A. I probably did.

Q. Is this it?

A. That is the paper that I made out, but as to whether it is an accurate copy I am unable to say.

Q. Have you any reason to doubt its accuracy?

A. None whatever, but every reason to believe it is; but I know nothing of it.

Q. Look at that paper, and state how much of it is in your handwriting, and what it is. (Presenting original protest to witness produced by counsel for libellant.)

A. I should say that my handwriting first appears in the certificate here, "21st August, 1872, Christian B. Beach."

Q. The main body of the protest is not in your handwriting?

A. Not in my handwriting.

Q. All on the first and second pages is not in your handwriting?

A. No; and this is not in my handwriting (ind.), except down where I signed my name.

Q. The jurat only is in your handwriting?

340 A. That is all, I believe.

Q. In both places?

A. Yes, sir.

Q. In whose handwriting is the rest, the main body of the protest?

A. It is Mr. Terrell's, I believe.

Q. Do you remember doing anything to it except swearing the witnesses?

A. Swearing the witnesses, and probably present when it was.

Cross-examination by Mr. TERRELL:

Q. That was made in your presence, was it, Mr. Beach, by the various witnesses?

A. It was.

Q. Signed by them?

A. Yes, sir.

Q. And sworn to by them?

A. Sworn to by them all except Robert Mott.

Mr. CONDON. You did not know any of these parties, did you?

A. No, sir.

Q. The party purporting to be Robert Mott signed that?

A. Yes, sir.

Respondent rests.

Libellant's rebuttal.

Counsel for libellant read in evidence the deposition of William P. Brien.

(Objected to by respondent; objection overruled.)

341 It is admitted by the parties respectively that J. Emery Bailey, of Toledo, Ohio, is bail for the libellant in this case.
Testimony closed.

United States district court within and for the northern district of Ohio.

THE STATE OF OHIO,
Northern District, ss:

WM. G. WINSLOW ET AL., PLAINTIFF,
against
THE SCH'R S. S. OSBORN ET AL., B. O. }
Wilcox, claimant, defendant.

The libellants will take notice that on Monday the 19th day of March, A. D. 1877, the above-named claimant and cross-libellant will take the depositions of Thomas Dougherty, James Bowen, William Christy, and others, sundry witnesses to be used as evidence on the trial of the above-entitled cause, at the office of William H. Condon, 152 La. Salle st., in the city of Chicago, county of Cook and State of Illinois, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that
342 the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

PRENTISS AND VARCE,
Attorneys for Cross-Libellants.

I acknowledge service of the above notice by copy this 15th day of March, 1877.

WILLEY, TERRELL AND SHERMAN.

The depositions of C. J. Vogall, John Cowans, James Bowen, Wm. W. Bates, and John G. Keith, witnesses of lawful age, produced, duly examined, cautioned and sworn on their corporal oaths on the 19th day of March, A. D. 1877, at the office of Wm. H. Condon, 152 La Salle st., Chicago, Illinois, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, by Mr. John C. Phillips, within and for the city of Chicago, county of Cook, and State of Illinois, in pursuance to the notice hereto annexed, and also under the provisions of the statute in such cases made and provided for the taking of depositions de bene essa.

Said depositions were taken to be read in evidence on behalf of the respondent and cross-libellant on the trial of a certain cause now pending and undetermined in the district court of the United States for the northern district of Ohio, held at Cleveland, Ohio, which is more than one hundred miles from Chicago, Illinois, in which suit Wm. Winslow et al. are libellants and the Schooner S. S. Osborn is respondent and B. O. Wilcox is claimant and cross-libellant.

343 The said C. J. Vogall, John Cowans, James Bowen, Wm. W. Bates and John G. Keith were each by me first duly cautioned,

carefully examined and sworn according to law, previous to the commencement of each of their examinations, to testify the truth, the whole truth, and nothing but the truth, as well upon the part of the libellants as of the claimants and cross-libellants, in relation to the matters in controversy, between the said parties so far as each should be interrogated thereto, on oath testified as follows:

And the said C. J. VOGALE, being first duly sworn according to law, deposes and says as follows.

Direct examination by WM. H. CONDON:

1st. Q. What is your name, age, residence and occupation?

A. C. J. Vogal; age, 44; Chicago; capt. mariner on lakes.

2. Q. On what vessels have you been employed at any time during the last seven years?

A. Propeller Equator, propeller Lady Franklin, steamer Gough, Manied, tug Goldsmith Maid.

3. Q. Do you know the parties to this suit?

A. I do not.

4. Q. When were you on board the schooner American Union last?

A. Yesterday, March 18th, about 8 p. m.

5. Q. Were there any signal-lights on the vessel at that time; if yea, where were they placed, how were they hung, and about what size?

A. Yes; they were placed just forward the mizzen rigging, outside of the monkey-rail, in the screens on the main-rail, at the place where the lights were carried, as shown by hole in the rail for iron bolt to fasten the screens; burning brightly, large-sized signal-lights, the same as used by a vessel of about the same size as the American Union.

6. Q. How high were the Union's lights, when in those screens, placed, as you stated, above the water?

A. I should think about 14 feet.

7. Q. Was the Union's rail any higher forward than aft, say about 15 feet forward of the foremast, than where her lights were carried?

A. Yes, it was between 3 and 4 feet.

8. Q. Was she light or loaded when you made these tests?

A. She was light, lying in Sampson's slip, south branch of Chicago River.

9. Q. Did you make any observation when about 60 or 70 feet ahead of the Union's jib-boom to ascertain whether her lights could be seen from that point; and, if so, at what elevation, if any, could they be seen?

A. I did; I could see her lights at about an elevation of about 25 feet above the water; it couldn't be seen at an elevation of 20 feet above water.

10. Q. In making that observation was your view obstructed in any way?

A. There was nothing to obstruct the view at all; I had a good opportunity to make the test; her rail forward was so much higher forward than it was where her lights were placed that I had to get to that elevation before I could see her lights.

11. Q. Did you make any tests as to the visibility of her lights at a distance of about 1,000 feet ahead of her?

345 A. I did, at a distance of about 1,000 or 1,100 feet; at a distance of 45 or 50 feet from dead ahead I could see her light. I had to get that distance from a line dead ahead to see the light. I made that observation at an elevation of 13 feet above the water.

12. Q. Did you take any observation of the lights at that distance ahead of the vessel on a level of the water?

A. I did, standing on the ice.

13. Q. Could her lights, standing thus, be seen dead ahead?

A. They could not.

14. Q. What distance, if any, from dead ahead could they be seen?

A. About 50 to 60 feet; had to go about five feet further to one side to see them than I did when I saw them from an elevation of 13 feet.

15. Q. In answering several questions you use the term dead ahead. Define that term as used by you.

A. It is a direct line with her masts.

C. J. VOGELL.

Subscribed and sworn to before me this 19th day of March, 1877.

[SEAL.]

JOHN C. PHILLIPS,
Notary Public.

And the said JOHN COWANS, being first duly sworn according to law, deposes and says as follows:

Direct examination by Mr. W. H. CONDON:

1st Q. What is your name, age, residence, and occupation?

A. John Cowans; age, 42; residence, Chicago; sailor, my occupation.

346 2. Q. How long have you sailed, and in what capacity?

A. Commenced sailing when 16; been master of a vessel the last 10 years.

3. Q. Did you make any observation of the visibility of the signal-lights on the schooner American Union, last evening? If yea, state the same.

A. I did.

4. Q. State fully what kind of lights were used, whether they were burning or not, how they were placed, and the different points from which you observed them, and give the results of your observations.

A. The usual signal-lights used on that class. I helped to place the light there, four feet forward of the mizzen rigging, on the main-rail, outside the monkey-rail. Where her lights were carried could be easily seen by the hole for the bolt that holds the screen. The vessel was light, and her lights were placed as stated; were about 12½ feet from the water, and about 15 feet forward of the foremast. Her rail was about 15 feet above the water. At her knight-heads her rail was about five feet higher than it was where her lights were. The lights were burning bright, as we use them when sailing. I made an observation of her lights from a point sixty or seventy feet ahead of her jib-boom, and had to stand on an elevation of 20 or 25 feet above the water in order to see them. I made another, of a distance of about 1,000 ft dead ahead of her, standing on a level with the lights, and could not see it, and had to go to a point 40 or 45 feet from dead ahead of her before I could see the light.

347 5. Q. Did you, when at that distance ahead of her, take any observation of her light, when standing on the ice, on a level with the water?

A. I did, and found I had to go about 50 or 55 feet from a line dead ahead of her before I could see the light.

6. Q. When you made these tests, what opportunity had you to see her lights from the points where you saw them and tried to see them?

A. There was no obstructions in the way; had a good chance to see her light.

JOHN COWANS.

Subscribed and sworn to before me this 19th day of March, 1877.

[SEAL.]

JOHN C. PHILLIPS,

Notary Public.

And the said JAMES BOWEN, being first duly sworn according to law, deposes and says as follows:

Direct examination by WM. H. COWEN:

1. Q. What is your name, age, residence, and occupation?

A. James Bowen; 40; Chicago; sailor part of the time.

2. Q. How long have you been connected with or interested in vessels?

A. These last 11 years.

3. Q. Were you on board and around the American Union last evening with Capt. Cowans and Vogel, when they were taking observations of her lights?

A. Yes, sir.

4. Q. How high was the Union's rail above the level of the river at her mizzen rigging, and at a point above 15 feet forward of her foremast?

A. At her mizzen rigging her rail is about 13 feet above the water, and about 16 feet above the water at a point about 15 feet forward of her foremast.

5. Q. Where were her lights placed, how were they burning, what size were they, and what time in the evening did you make any observations of them?

A. The lights were placed about four feet forward of her mizzen rigging at the main-rail, outside the monkey-rail. They were burning bright. They were the usual size for large vessels. I made the observations between 7 and 8 p. m.

6. Q. What test, if any, did you make to see her lights from any points ahead of her and in line with her spars?

A. About 75 feet dead ahead of her, at an elevation of 25 feet, I could see her lights, but at no less distance, to the best of my opinion and knowledge. I went about 1,000 feet dead ahead of her, on an elevation 12 or 15 feet above the water, where I could get a good view of her, and the lights could not be seen dead ahead until I got about to 50 feet from dead ahead of her. They could not be seen on either side until you got that distance on either side from dead ahead of her.

7. Q. At a distance of about 1,000 feet ahead of her on a level with the water, 50 feet from dead ahead of her, did you try to see her lights?

A. I did not; the others tried to.

JAMES BOWEN.

Subscribed and sworn to before me this 19th day of March, 1877.

[SEAL.]

JOHN C. PHILLIPS,

Notary Public.

And the said WM. W. BATES, being first duly sworn according to law, deposes and says as follows:

Direct examination by WM. H. CONDON:

1st Q. What is your name, age, residence, and occupation?

A. Wm. W. Bates; 50; Chicago; designer, builder, and repairer of vessels.

2. Q. How long have you followed those occupations?

A. Since I have been of age. In fact, since I have been 13 years old. Have been in that business since 1864-'65 in Chicago.

3. Q. How many vessels have you designed and built, or assisted in building, in the past 25 years?

A. 20, more or less, varying in size from the largest to the smallest; am familiar with the business of naval architecture thoroughly; have designed a sloop of war.

4. Q. Have you ever been engaged, and if yea, how long, on any periodical devoted to ship-building and designing?

A. For three years I was associate editor of the Nautical Magazine and Naval Journal, published by Griffiths and Bates, New York, May, '54 to 1858, devoted to ship-building, engineering, and commerce.

5. Q. Did you have anything to do with the preparing the 350 rules for construction, inspection, and classification of all lake vessels—1875 or 1876—if yea, state the same?

A. I did, in 1875-'76, prepare the present rules for construction, inspection, and classification of lake vessels for Capt. A. P. Dorr, of Buffalo, the proprietor of the work, and general agent of the Etna Insurance Company on the lakes.

6. Q. Have you ever be'n proprietor of a dry dock in Chicago; if yea, how long?

A. I have been coproprietor for about 9 years, or thereabouts, and in the course of my experience have repaired many hundred of vessels.

7. Q. Do you know the parties to this suit personally?

A. I knew one of the Winslows and knew the schooner Osborn.

8. Q. Do you know the American Union; and, if yea, how long and when were you last on board of her?

A. I have known her many years; I was last on board of her yesterday.

9. Q. Did you examine her with anybody; and, if yea, with whom, for the purpose of ascertaining her form and shape, and how they affected the visibility of her lights in a certain location?

A. I examined her in company of Capt. John G. Keith, and took measurements of her hull in his presence, which we verified at the time with a view to drawing plans on paper to correctly represent her dimensions and form, and the obstacles affecting the visibility of her lights, to wit, the rigging, the shrouds, the fore and main masts, and the timber-heads, and anchor-stocks, and bowsprit and the monkey-rail around the vessel.

351 10. Q. In what manner did you proceed in order to take those measurements?

A. I measured the length of the vessel from taffrail to knight-heads, and divided it into divisions of 16 feet spaces; at each joint of divisions in the length I took the half breadths to outside of main-rail, and also at each division of length I took the hights of the main-rail from light water-line, that is to say, from the upper surface of the ice around her. I also measured the width of the rail, the height of the monkey-rail, and the positions of the masts, shrouds, timber-heads, anchor-stocks, the position of the lamps-height of the bullwarks, and took other measurements, enabling me to make the plans lettered A, B, and C accompanying this testimony.

11. Q. Did you find your various measurements to prove correct when you came to make your plans, or otherwise?

A. I found that the measurements were very correct, indeed. I could scarcely have expected them to have come so well on a drawing of only

one-eighth ($\frac{1}{8}$) of an inch to the foot—there were no corrections found to be necessary.

12. Q. Do you know as an architect that your drawings for all practical purposes may be taken as absolutely correct?

A. I do, most certainly.

13. Q. You have referred to the plans A, B, and C of the hull of the American Union, what other lines have you projected upon your draft?

A. I have projected the lines of light and shadow, which are indicated by dotted marks moving along and ahead of the vessel, and they are correct representations of the lines of light and width of shadow, and refer to the draft for a better description of them.

14. Q. Do the shadows of the vessel's lights increase or diminish with distance?

A. They increase two directions—horizontally and vertically.

15. Q. What would be the width of the shadow of the vessel's hull at a point a $\frac{1}{4}$ of a mile distant right ahead of her?

A. From my measurement the width of the shadow of the hull at a quarter of a mile distant right ahead is 121 feet 4 inches.

16. Q. What is the width at $\frac{1}{2}$ mile?

A. 215 feet, 4 inches.

17. Q. What is the width at $\frac{3}{4}$ of a mile?

A. 309 feet, four inches.

18. Q. What is the width at one mile?

A. 403 feet and 4 inches.

19. Q. At what height is the top of the shadow from the water at $\frac{1}{4}$ of a mile right ahead?

A. 25 feet.

20. Q. At $\frac{1}{2}$ of a mile?

A. 37 feet.

21. Q. At $\frac{3}{4}$ a mile?

A. 61 feet.

22. Q. At $\frac{1}{2}$ of a mile?

A. 85 feet.

23. Q. At a mile?

A. 119 feet.

24. Q. Do you mean to say that at the distance of $\frac{1}{4}$, $\frac{1}{2}$, $\frac{3}{4}$, and one mile that the lights of this vessel would be invisible right ahead within the widths, and at the heights from the water that you have stated.

A. I do, and the plans will show it.

25. Q. Why does the shadow right ahead increase so rapidly as you have described?

A. It increase' in width because the hull is so much wider at the midships than it is at the position of the lights, which is just forward of the mizzen rigging on the main-rail, as shown on the plans A, B, & C; this difference in width is about 5 feet; the exact difference can be ascertained by the scale on the plan.

26. Q. Why does the shadow right ahead increase so rapidly from the water?

A. It is because the bow of the vessel is so much higher than the position of the lamp from the water. This difference of light is about 3 feet, as may be seen on the plans by the scale.

27. Q. Please attach your draft as Exhibit A to your deposition.

A. Here it is; attach it to my deposition as Exhibit A.

WM. W. BATES.

Subscribed and sworn to before me this 19th day of March, 1877.

[SEAL.]

JOHN C. PHILLIPS.

And the said JOHN G. KEITH, being first duly sworn according to law, deposes and says as follows:

Direct-examination by WM. H. CONDON:

354 1. Q. What is your name, age, residence, and occupation?

A. John G. Keith; 34; Chicago; vessel master.

2. Q. What vessel were you master of the last season, and how long have you been master of her?

A. Schooner Halstead; from her first existence, 4 years.

3. Q. How long have you been officer of a vessel?

A. 13 years; master 10 or 11 years.

4. Q. Have you ever been ship carpenter; and, if yea, how long have you worked at that business?

A. I have. Have worked several winters at that business.

5. Q. Have you ever been interested as part owner; and, if yea, how long?

A. I have been interested in vessels as part owner for 10 years.

6. Q. Have you recently made any measurements of the schooner American Union in company with anybody; if yea, whom?

A. I have, in company with Wm. W. Bates.

7. Q. What measurements did you and he make of said vessel?

A. We measured her length from taffrail to knight-heads, her half breadth at sections of 16 feet apart, the whole length of the vessel, and height from water to top of main-rail the full length of the vessel opposite each section, as stated, in breadth.

8. Q. Did you know that schooner in August, 1872; and, if yea, state whether she has been changed any since then?

A. I knew the vessel in fall of '72, and part of the monkey-rail she then had she has not now; that part is wanting between the after part of fore-rigging and forward part of cabin.

355 9. Q. Did her monkey-rail she then carried affect in any way a view of the lights from a position ahead of her; if yea, how?

A. In a measure it would, as the top of the light being about equal with top of monkey-rail, and as the rail raised in the forward body of the vessel it would obstruct the view of the light from a position ahead or nearly ahead of the vessel.

10. Q. How does the schooner Halstead compare with the size of the American Union?

A. The Halstead is somewhat larger than the American Union and of the same rig as she is.

11. Q. Where do you carry the signal-lights on your schooner?

A. On screens forward of the fore-rigging on each side.

12. Q. Why don't you carry them aft on the rail just forward of the mizzen-rigging?

A. Because I consider it an improper place, for the reason that my vessel is considerably wider amidships than at the mizzen-rigging; also considerably higher forward than at the mizzen-rigging, as vessels usually are; therefore the lights would not be seen directly ahead, the view being obstructed by main and fore-rigging, timber-heads, &c., &c.

13. Q. How does the form of rail of your schooner compare with that of the American Union?

A. It is strikingly similar.

14. Q. If the American Union had carried her lights forward of her fore-rigging how much nearer would they be to an object approaching her from ahead?

A. About 112 or 115 feet.

15. Q. Would that be any advantage to a vessel approaching her ahead, or nearly ahead?

A. It would, more especially in close contact; the nearer the lights the plainer to be seen, as 100 additional feet would often clear a collision that would otherwise occur.

16. Q. Are there any disadvantages in carrying the lights forward?

A. A great many vessel masters object to carrying them forward, for the reason they are more liable to be washed away, and that the square-sail setting and taking in would interfere, but I have never found any of those difficulties, as the square-sail is subordinate to the lights, not the lights to the square-sail; the lights must be seen, while we can sail without a square-sail.

17. Q. Look at Exhibit A to Wm. W. Bates' deposition, and state whether the diagrams and calculations made thereon are correct or not.

A. They are correct, as I assisted Mr. Bates in making the measurements and verified the same by measuring the plans or diagrams on this exhibit, and find them to accurately correspond with the measurements actually made by us.

JOHN G. KEITH.

Subscribed and sworn to before me this 19th day of March, 1872.

[SEAL.]

JOHN C. PHILLIPS,

Notary Public.

357 STATE OF ILLINOIS,
Cook County, City of Chicago:

I, John C. Phillips, a notary public in and for said county, duly appointed, commissioned, and acting as such, do hereby certify that, in pursuance of the annexed notice, I caused the said C. J. Vogall, John Cowans, James Bowen, Wm. W. Bates, and John G. Keith, whose names are subscribed to the foregoing depositions, to appear before me on the 19th day of March, A. D. 1877, at Wm. H. Condon's office, 152 La Salle street, Chicago, Illinois, at which time Wm. H. Condon was present as proctor for claimant and cross-libellant; that previous to the commencement of the examination of said witnesses by Wm. H. Condon each of said witnesses was by me first duly cautioned, carefully examined, and sworn according to law to testify the truth, the whole truth, and nothing but the truth, relative to the matters in controversy in a cause now pending and undetermined in the district court of the United States for the northern district of Ohio, held at Cleveland, Ohio, which is more than one hundred miles from Chicago, Illinois, in which suit Wm. G. Winslow et al. are libellants and the schooner S. S. Osborn is respondent and B. O. Wilcox is claimant and cross-libellant, so far as he should be interrogated concerning the same; that said depositions were taken at Wm. H. Condon's office, 152 La Salle street, Chicago, Illinois, on the day above stated, and were reduced to writing by me, John C. Phillips, and that I am not attorney for or related to either of the parties to the above-entitled suit, nor interested in the event thereof, and that after said depositions were taken by me as aforesaid the interrogations and answers thereto of the witnesses as written down by me were read over to the said C. J.

Vogall, John Cowans, James Bowen, Wm. W. Bates, and John G. Keith, and that thereupon the same were duly signed and sworn to by each of said witnesses before me, at the place and on the day and year aforesaid, and that each of said depositions have been retained by me ever since.

In witness whereof I have hereunto affixed my hand and notarial seal this 19th day of March, A. D. 1877.

[SEAL.]

JOHN C. PHILLIPS,
Notary Public.

Protest.

UNITED STATES OF AMERICA,

State of Ohio, Cuyahoga County, City of Cleveland, ss:

To all whom these presents shall come or may concern, I, Clifton B. Beach, a notary public in and for the State of Ohio, by letters patent under the great seal of the said State, duly commissioned and sworn, dwelling in the city of Cleveland, send greeting:

Know ye that on the 21st day of August, in the year of our
359 Lord one thousand eight hundred and seventy-two, before me, the said notary, appeared Captain Robert F. Parsons, of the schooner called the American Union, of Buffalo, New York, burthen 543 tons, and noted in due form of law, with me, the said notary, his protest for the use and purposes hereinafter mentioned. And now, at this day, to wit, the day of the date hereof, before me, the said notary, at the city of Cleveland aforesaid, again comes the said Captain Robert F. Parsons and requires me to extend his protest; and, together with the said Captain Robert F. Parsons, also came C. O. Ingraham, mate; E. Ingraham, 2nd mate; E. Outis, A. Outis, Geo. Magley, Frank Wicks, T. G. Gilkison, and Robert Mott, seamen, belonging to the aforesaid schooner, all of whom being by me duly sworn voluntarily, freely, and solemnly do declare and depose as follows, that is to say: That on Monday, August 5th, 1872, he, the said Captain Robert F. Parsons, set sail and departed in and with the said schooner American Union, as master thereof, from the port of Cleveland, Ohio, having on board the said schooner no cargo, said schooner American Union being light, and bound for the port of Escanaba, Michigan; that the said schooner was then stout, staunch, and strong; had her cargo well and sufficiently stowed and secured; was well masted, manned, tackled, victualled, apparrelled, and appointed, and was in every respect fit for sea and the voyage she was about to undertake. On Friday, August
360 9th, 1872, the said schooner American Union came to an anchor at 1 o'clock a. m. at Sand Bay, on the east side of Beaver Island, in Lake Michigan, the wind at that time blowing from the southwest; weather squally. Schooner remained at anchor there till 9 o'clock p. m. of the same day. Schooner then got under way, the wind having shifted to about northwest by north. Schooner was abreast of Beaver Island light-house at 11½ o'clock p. m. of the same day, and at that time the schooner was hauled up by the wind, with sheets flat aft. The orders to the man at the wheel were to keep her full and by, which would make her head about due west, with starboard tacks aboard. Schooner continued on in this way until about five minutes after 12 o'clock p. m., when we made the green light of a vessel about two points off our lee or port bow. We held our course steadily, and about ten or fifteen minutes after we made the lights of the vessel. She struck us on our port bow, about 15 feet from the stern, crushing in

our planks, frames, and ceiling, breaking our clamps and breast-hook, tearing our flying jib, springing our jib-boom, and breaking our head gear. For a half hour previous to the collision and at the time of the collision the night was bright and starlight. There was about an 8-knot breeze. Our course at the time of the collision was about west, and had been for three-fourths of an hour prior thereto; the course of the colliding vessel at the time of the collision was about northeast, and no variation of her course was noticed after her lights were first made, unless just before she struck. The wind at the time

of the collision was about northwest by north, and had been in that direction for an hour prior to the collision. At the time of the collision and for an hour prior thereto our schooner had her lights properly placed and screened and brightly burning, and our officers and men were each and all at their respective proper posts and places, vigilant and attentive to their duties. The colliding vessel afterwards proved to be the schooner S. S. Osborn, of Fairport, Ohio.

And the said Captain Robert F. Parsons farther says: That as all the damage and injury which already has or may hereafter appear to have happened or occurred to the said schooner or her cargo has been occasioned solely by the circumstances hereinbefore, and cannot nor ought to be attributed to any insufficiency of the said schooner American Union, or default of him, this deponent, his officers or crew,

He now requires me, the said notary, to make his protest and this public act thereof, that the same may serve and be of full force and value, as of right shall appertain; and thereupon the said Captain Robert F. Parsons doth protest, and I, the said notary, at his special instance and request, do by these presents publicly and solemnly protest against winds, weather, and seas, and against said collision and against all and every accident, matter, and thing had and met with as aforesaid, whereby or by means whereof the said schooner American Union or her cargo already has or hereafter shall appear to have suffered or sustained damage or injury for all losses, costs, charges,

expenses, damages, and injury which the said schooner, or the owner or owners of the said schooner, or the owners, freighters, or shippers of her said cargo, or any other person or persons interested or concerned in either, already have or may hereafter pay, sustain, incur, or be put into, by or on account of the premises, or for which the insurer or insurers of the said schooner or her cargo is or are respectively liable to pay or make contribution or average according to custom, or their respective contracts or obligations; and that no part of such loss and expenses already incurred, or hereafter to be incurred, do fall on him, the said Captain Robert F. Parsons, his officers, or crew.

Thus done and protested in the city of Cleveland this 21st day August, in the year of our Lord one thousand eight hundred and seventy-two.

In testimony whereof I, the said notary, have subscribed these presents, and have also caused my seal of office to be hereunto affixed, the day and year last above written.

[SEAL.]

CLIFTON B. BEACH,
Notary Public.

STATE OF OHIO,

Cuyahoga County, City of Cleveland, ss:

Robert F. Parsons, E. INGRAHAM, C. O. Ingraham, E. Outis, A. Outis, Geo. Magley, Frank Wicks, T. G. Gilkison, and Robert Mott, seamen of and belonging to the schooner called the American

363 Union, being severally duly sworn, do severally make oath and say that the foregoing instrument of protest hath been clearly read over to them, these deponents, and that the several matters and things therein contained are right and true in all respects, as the same are therein particularly alleged, declared, and set forth.

R. F. PARSONS.
C. O. INGRAHAM.
EDWARD INGRAHAM.
E. OUTIS.
ALBERT OUTIS.
GEORGE MAGLEY.
FRANK WICKS.
THOMAS G. GILKISON.
ROBERT ^{his} × MOTT.
mark.

Subscribed and sworn to before me this 21st day of August, 1872.

[SEAL.]

CLIFTON B. BEACH,

Notary for said County.

STATE OF MICHIGAN,

County of Delta, ss:

Robert Mott, being duly sworn, deposes and says that he relieved Elipalet Outis from the lookout forward on topgallant-forecastle deck at 12 o'clock in the night; had been there about five minutes when I saw a green light two points to our lee bow, and the light was to leeward of us all the time until the collision with the S. S. Osborn,

night of the 9th and the morning of the 10th of August, and did 364 not leave the lookout until the vessel was about to strike the American Union, and then he ran aft.

ROBERT ^{his} × MOTT.
mark.

Sworn to and subscribed before me this 13th day of August, 1872.

F. O. CLARK,

Notary Public, Delta County, Michigan.

STATE OF MICHIGAN,

County of Delta, ss:

George Magley, being duly sworn, deposeth and says that he relieved Thomas G. Gilkison of the wheel of the American Union at 12 o'clock night of the 9th and 10th of August, 1872, and got the course from him "full and by the wind;" the vessel would head due west, and that she was kept steady on her course; and had been there about 15 minutes when I heard Chas. O. Ingraham, first mate, halloo to the Osborn "to keep away, you will be into us;" immediately afterwards I heard a crash; the vessels had collided. The American Union had not varied a particle from her course until the collision.

GEORGE MAGLEY.

Sworn to and subscribed before me this 13th day of August, 1872.

F. O. CLARK,

Notary Public for Delta County, Michigan.

365 STATE OF MICHIGAN,

County of Delta, ss:

Thomas G. Gilkison, being duly sworn, deposes and says that he relieved the wheel of the American Union at 10 o'clock p. m. August

9th, and remained there until (12) twelve o'clock in the night; and between the hours of eleven and twelve we were abreast of Beaver Island light, when the vessel was hauled by the wind, the sheets flat aft; and the captain, Robert F. Parsons, was standing near me at the wheel when he gave me the order to keep the vessel by the wind, which I did; she would head due west, close by the wind, and she was kept so until 12 o'clock, when I was relieved by George Magley, and I told him to keep her full and by the wind.

THOMAS G. GILKISON.

Sworn and subscribed before me this 13th day of August, 1872.

F. O. CLARK,

Notary Public for Delta County, Michigan.

STATE OF MICHIGAN,

County of Delta, ss:

Deposition of Robert F. Parsons, captain of the schooner American Union, taken on the 13th day of August, 1872, at Escanaba, county of Delta, State of Michigan, before me, a notary public for the county of Delta aforesaid:

The said Robert F. Parsons, being duly sworn, deposes and says as follows:

That he is captain of the schooner American Union; and that
 366 on Friday, the 9th day of August, lie at anchor at Beaver Island until half past nine o'clock p. m.; wind shifted from south-west to "nor'-nor'west;" we hove up anchor and left for Escanaba, and half past eleven o'clock same evening we were abreast of Beaver Island light-house; wind shifted to "nor'west;" we hauled the vessel by the wind, the sheets flat aft, and told the man at the wheel, Thomas Gilkinson, to keep her full and by the wind, and by the wind she would head due west on the wind, with starboard tacks. At 12 o'clock I was not feeling well, and I asked Mr. Charles O. Ingraham, my first mate, to stop on deck in charge for me one hour and I would lie down. He and the 2nd mate both stopped on deck, as it was the 2nd mate's watch on deck. I went below and laid down on my bed with boots and all my clothes on, and had been lying down about ten minutes when Mr. Chas. O. Ingraham came to my door and called me on deck. I immediately went on deck; he said there was a vessel coming pretty close to us; he pointed to leeward, showing me a green light about two points on our lee or port bow; I told Mr. Ingraham to go forward and hallo to him to keep away, which he immediately did; we could not keep out of his way as we were on the starboard tack by the wind, and our vessel kept steady on her course. Immediately after Mr. Ingraham halloed to keep away I saw the other vessel luff up, and should judge it was about a minute or a minute and a half until he struck us. The vessel proved
 367 to be the S. S. Osborn, bound to the eastward with a cargo of iron ore. She struck us on the lee bow about 15 feet from the stern, crushing in our plank frames and ceiling and breaking our clamps and breastwork; tore our flying jib; sprung our jibboom; broke all of her head-gear. We made the vessels fast together until we ascertained whether they would sink or float; we got them separated on the morning of the tenth, the Osborn being in an unmanag'able condition. The American Union took her in tow; towed her down the straits until 3 o'clock p. m., until the propeller City of Concord took the Osborn from us in tow, when we "about ships" and proceeded on our voyage

to Escanaba, where we arrived without any further disaster on the 11th day of August at 9 o'clock p. m.

(Signed)

ROBERT F. PARSONS.

Sworn to and subscribed before me this 13th day of August, 1872.

F. O. CLARK,

Notary Public for Delta County, Mich.

STATE OF MICHIGAN,

County of Delta, ss :

The following persons, being duly sworn, depose and say, viz, Charles O. Ingraham, Edward Ingraham, Elipalet Outis, Robert Mott, Thomas G. Gilkison, Albert S. Outis, George Magley, Frank Wicks, that they were all on deck at the time of the collision above referred to in the deposition made by Captain Robert F. Parsons, and that they have heard such deposition read and know it all to be true, except as
368 regards the conversation therein referred to between the captain and first mate, which they did not hear, except the first mate himself, which he says is true in substance and matter.

CHARLES INGRAHAM.

EDWARD INGRAHAM.

E. OUTIS.

FRANK WICKS.

THOMAS G. GILKISON.

ROBERT ^{his} + MOTT.

^{mark.}
GEORGE MAGLEY.

Sworn to and subscribed to before me this 13th day of August, 1872.

F. O. CLARK,

Notary Public for Delta County.

DELTA COUNTY, ss :

I do hereby certify that the within is a true copy of protest and affidavits made before me by the within-named parties, on file in my office, October 25th, 1872.

F. O. CLARK,

Notary Public.

(Here follows diagram marked page 369.)

370

Commissioner's report.

In the district court of the United States for the northern district of Ohio.

WM. G. WINSLOW ET AL.

vs.

SCH'R S. S. OSBORN, BLISS O. WILCOX, CLAIM-
ant.

} 705. Admiralty.

The report of Earl Bill, commissioner, to whom this cause was referred to take and state an account of the damages sustained by said libellants by reason of the collision in their libel set forth.

The testimony of sundry witnesses has been taken by said commissioner, in the taking of which he has been attended by the proctors of

the respective parties to this suit, and which testimony is filed in said court with this report. Since the taking of said testimony the said parties, by their respective proctors, have, in presence of said commissioner, admitted that the expenses paid by said libellants for repairs upon the said schooner American Union made necessary by reason of the collision aforesaid amount to the sum of fifteen hundred (\$1,500) dollars, and that the damages to said libellants by reason of the delay or "demurrage" caused by the collision aforesaid amount to the further sum of sixteen hundred (\$1,600) dollars, making in all the sum of thirty-one hundred (\$3,100) dollars, which said sum is found accordingly; and it is further found that upon the sum last aforesaid the libellants are entitled to interest, to be computed from the 3rd day of October, 1872, to the first day of the present term of this court (the same being by like admission of said parties, so far as said dates are concerned, and if interest is to be computed at all upon said damages), which said interest is found by said commissioner to be the sum of \$930.00, said damages and interest in all amounting to \$4,030.00.

It is therefore found by said commissioner that the libellants are entitled to recover as their damages by reason of the collision aforesaid the aforesaid sum of four thousand and thirty dollars (\$4,030.00), besides the costs of this action.

Respectfully submitted.

EARL BILL,
Commissioner.

Testimony taken before commissioner.

In the district court of the United States for the northern district of Ohio.

W. G. WINSLOW ET AL. }
vs. } No. 705. In admiralty.
SCH'R S. S. OSBORN. }

Testimony of witnesses sworn and examined October 23rd, 1877, by and before Earl Bill, commissioner, to whom the above cause
372 referred to take and state an account of the damages sustained by said libellants by reason of the collision in the libel mentioned. Present, H. L. Terrell, counsel for libellants, and C. M. Varce, counsel for claimant of defendant.

J. W. WALTON, being duly sworn, deposes as follows :

I am a member of the firm of Upson and Walton, of Cleveland, ship-chandlers. In 1872 our firm supplied the sch'r American Union with an outfit or supplies. The bill now shown me, marked A, contains a statement of articles furnished by our firm at the times stated therein, and the charges therefor are reasonable and proper, or were at the time. The amount of the bill is \$175.49. This bill was made out separately from other supplies during the season, for the reason that, as I was informed, the supplies were for the repair of damages to the vessel. This information came from some one representing the Union.

J. WHITTLESEY WALTON.

FRANK WRIGHT, being also duly sworn, deposes and says as follows

I am bookkeeper for Presley and Co., proprietors of dry-dock in Cleveland, and ship-builders and repairers. I was formerly bookkeeper for

the former firm of Stephens and Presley, in 1872, who were then engaged in the same business and predecessors of Presley and Co.

373 The schooner American Union was repaired at their dock in 1872. The amount charged for said repairs, for labor and materials, is \$1,156.59, the bill whereof is here exhibited, marked B. These charges were at the time reasonable and just. The time occupied in making said repairs was as follows: It was commenced August 23, 1872, and finished September 21st, 1872. These repairs were made on the forward end of the vessel.

Cross-examination by Mr. VARCE:

Our books do not indicate upon what particular part of the vessel the repairs were made any more than the bill does. I was present during the making of the repairs in the yards, but I am unable to specify upon what particular part of the vessel each item of labor and material were applied.

Our books indicate that this bill is for items used upon the forward end of the vessel, there having been two accounts kept, one for the forward end and the other aft. Both were made at the same time, but the account for each was kept separate on the books at the request of Presley, and I may have heard the captain's directions to the same effect, but am not certain. The separation in detail was made under the direction of the foreman of the work, and the charges were so separately made at the dictation or direction of the foreman or Mr. Presley, though in some instances I may have made the measurements of material myself.

FRANK WRIGHT.

374 Also J. B. COWLE, being duly sworn, deposes as follows:

I was in 1872, and am now, one of the proprietors of the Globe Iron Works, which in 1872 made some Hauser pipes and a beveled chock, and labor thereon, for the American Union schooner. The bill now exhibited, marked C, contains the items of the account for the same, and the charges therein contained were reasonable in amount. We delivered the articles to the ship-yard of Stephens and Presley.

JOHN B. COWLE.

Also REUBEN D. SWAIN, being duly sworn, deposes as follows:

In 1872 I was a member of the firm of V. Swain's Sons, and still am, which firm furnished supplies to the American Union in that year. The bill now exhibited, marked D, contains the items of said supplies, and the charges therein contained were reasonable in amount.

The articles were delivered to the vessel.

V. SWAIN'S SONS.

375

A.

CLEVELAND, OHIO, 16 Sept., 1872.

Sch'r American Union, bought of Upson & Walton, importers and dealers in steel and galvanized wire rope, manila and tarred cordage, oakum, anchors, chains, blocks, canvas, ship-chandlery, and supplies; agents for Mount Vernon Duck Co.; 129 & 131 River st., & 140 and 141 Dock:

REC. 243-12

Aug. 21.	1 coil 3½ manila, 348#	19..	66 12
24.	180 y'ds No. 4 cott. duck	39..	70 20
29.	40 fath. 2½ manila, 62#	19..	11 78
	1 q. " Lyle pat. block		3 15
	1 q. " d'ble do		5 94
Sept. 10.	4 y'ds parcelling	11..	50
	4 " rounding	18..	72
11.	2 " lamp-black	18..	36
14.	1 cocup side-light		14 50
	3½ " ratline	16..	52
			173 79
16.	4 y'ds parcelling, 11, 50; 7½ ratline, 16, 1.20.		1 70
			175 49

Forward end. Collision No. 1.

376

B.

CLEVELAND, OHIO, Sept. 28th, 1872.

Sch'r American Union, to Stephens and Presley, dr.

[Ship builders and repairers, & proprietors of dry-dock. Harvey Stephens. George Presley. Office & yard, No. 95 Elm street.]

1872.

Aug. 26.	For 5,592 feet oak	40..	223 68
"	377# spikes	8..	30 16
"	352 " iron	7..	24 64
"	jibboom stick		30 00
"	4 washers	2..	08
"	66 feet pine	25..	1 65
"	16# nails	7..	1 12
"	150# oakum	13..	19 50
"	35# paint	15..	5 25
"	seam-brushes	21..	50
"	tongues to bulkheads		1 00
"	154 feet pine	40..	6 16
"	blacksmithing		65
"	10 deck plugs		50
"	560 feet decking	45..	25 20
"	2 days' labor	5 00..	10 00
"	11 " "	4 00..	44 00
"	191 " "	3 50..	668 50
"	32 " "	2 00..	64 00
			1,156 59

Rec'd pay.

STEPHENS & PRESLEY.

377

C.

CLEVELAND, OHIO, Sept. 21st, 1872.

Barque American Union bought of Globe Iron Works:

[Manufacturers of marine, stationery, and portable engines & boilers; castings of all descriptions; special attention given to vessel, rolling-mill, & gas-work casting. J. B. Cowles, J. F. Pankhurst, R. Wallace, H. D. Coffinbury, proprietors. Office & works, cor. Elm & Spruce sts., west side.]

Sept. 10.	To 6½ h'rs on Hauser pipe patterns	@45 ..	2 93
16.	2 Hauser pipes, 258#	@ 5½..	14 19
	1 bevel chock, 62#	" ..	3 41
	4 h'rs drill pipes	@56 ..	2 00
			\$22 53

D.

CLEVELAND, OHIO, Aug. 29th, 1872.

Sch'r American Union to V. Swain's Sons, dr.

[Ship-chandlers and sail-makers; importers and dealers in steel and galvanized wire rope, oakum, blocks, &c., &c.; manufacturers of manilla and tarred cordage; agents for Woodbury and Druid cotton ducks. Nos. 155 and 157 River street; 149 and 150 Dock.]

378	64 feet 5 $\frac{1}{2}$ }	155 lbs. t'd rope	16..	24	80
	66 " 4 $\frac{1}{2}$ }				
Lanyards,	142 " " "	16..	22	72
	57 " sp. yarn.....		16..	9	12
					<hr/> 56 64

Forward end. Collision No. 1.

Exceptions to report.

In the district court of the United States in and for the northern district of Ohio. In admiralty.

W. G. WINSLOW ET AL.	} In admiralty. Exceptions to report.
<i>vs.</i>	
THE SCH'R S. S. OSBORN.	

And now comes the defendant and excepts to the report of Earl Bill, clerk in this cause, and for grounds for exceptions the defendant avers that the amount found as the cost of repairs is too large an amount for the same, and the amount found for demurrage is too large an amount therefor.

PRENTISS AND VARCE,
Proc. for Def't.

379 *Final decree.*

October term, A. D. 1876. Wednesday, December 26th.

Present, the honorable Martin Welker, district judge.

W. G. WINSLOW ET AL.	} 705. Admiralty.
<i>vs.</i>	
SCH'R S. S. OSBORN, BLISS O. WILCOX, CLAIM- ant.	

The report of Earl Bill, commissioner, to whom it was referred to ascertain and report the damages of said libellants by reason of the collision in said libel set forth, having made and filed his report, and by consent of parties this cause came on to be heard thereupon, and upon the exceptions to said report by said claimant, and on motion of said libellants, by H. S. Terrell, their proctor, it is ordered that said exceptions be overruled, and that said report and the matters therein contained be in all things confirmed.

And it is therefore ordered, adjudged, and decreed by the court that said libellants recover against said schooner S. S. Osborn the sum of four thousand and thirty dollars, their damages so in and by said report found and assessed by reason of the collision aforesaid, together

with their costs in this behalf expended, taxed at \$517.48, and that the cross-libel filed herein by the said Bliss O. Wilcox be, and the same is hereby, dismissed.

380 And it being shown to the court that Bliss O. Wilcox, J. Emery Bailey, and Thomas Courtright have stipulated, in the sum of seventeen thousand dollars, that they will abide and answer the decree of this or any appellate court in this cause, as by their bond duly taken and returned into this court by the marshal, with the mesne process issued herein, it duly appears, it is therefore ordered, adjudged, and decreed that said libellants recover of the said Bliss O. Wilcox, J. Emery Bailey, and Thomas Courtright said sum of four thousand and thirty dollars, the damages aforesaid, and also the costs aforesaid, taxed at \$517.48.

And thereupon said Bliss O. Wilcox, claimant, of said schooner S. S. Osborn, gave due notice of his intention to appeal this cause to the next circuit court, which said appeal is allowed, and bond therefor is fixed at the sum of \$8,000.

And it is further ordered that the time within which said appeal shall be perfected shall be extended for the period of twenty days from this date.

381 NORTHERN DISTRICT OF OHIO, ss :

It is hereby certified that the foregoing is a transcript of the record and proceedings in the district court of the United States within and for the district aforesaid, in the case named at the beginning thereof, made up pursuant to the 53rd of the admiralty rules of practice prescribed by the Supreme Court of the United States.

Witness my official signature and the seal of the said court, at Cleveland, in said district, this 22nd day of February, A. D. 1878.

[SEAL.]

EARL BILL, Clerk,
By GEO. WYMAN,
Deputy Clerk.

382

Appeal.

In the circuit court of the United States within and for the northern district of Ohio.

BLISS O. WILCOX, APPELLANT,

vs.

WILLIAM G. WINSLOW AND HEZEKIAH J. Winslow, appellees. } Appeal.

The said Bliss O. Wilcox represents to the court here that on the 26th day of December, A. D. 1876, in a cause in admiralty then pending in the district court of the United States for said district, wherein the said William G. Winslow and Hezekiah J. Winslow were libellants, and the schooner S. S. Osborn, her tackle, &c., and the appellant, as claimant thereof, were respondent, and appellant, as such claimant, was cross-libellant, and the schooner American Union, her tackle, &c., and said appellees, as claimants thereof, were respondents to said cross-libel, said district court rendered a decree in favor of said appellees, as such libellants, and against the appellant, as such claimant, and J. Emery Bailey and Thomas Cartright, as bail, for \$4,030.00 damages and \$517.48 costs, and dismissing said cross-libel, as by the transcript of the record of said cause and decree filed in this cause doth appear.

And said Bliss O. Wilcox hereby appeals from said decree and prays that upon the hearing of said appeal upon the testimony offered
383 in said district court, and upon new proofs to be offered by appellant as follows:

As to the course and locality of the vessel American Union and S. S. Osborn at and before the collision in the libel complained of, and thereafter;

As to the direction of the wind at and before the time of said collision at and near the locality thereof;

As to the sail carried by each of said vessels, and as to the manner of said collision and the injuries caused thereby;

As to the visibility of the American Union's lights before and at the collision, and as to the improper placing and carrying of said lights by said vessel;

As to the sufficiency and competency of the lookout on said American Union before and at the collision;

As to the credibility of the libellants, witnesses, and to contradict the testimony of the same;

To impeach Robert F. Parsons, a witness produced and used by the libellants—

That said decree may be vacated and reversed, and that appellant may recover of said appellees his damages and costs, as in his cross-libel in said cause in said district court he prayed.

PRENTISS AND VARCE,

Proctors for Appellant.

BLISS O. WILCOX, *Appellant,*

By PRENTISS AND VARCE.

Filed Feb. 26th, 1878.

384

Motion to dismiss appeal.

U. S. circuit court, northern district of Ohio. In admiralty.

W. G. AND H. J. WINSLOW }

vs.

SCHOONER S. S. OSBORNE. }

Motion to dismiss appeal.

And now come the said libellants, by H. L. Terrell, their proctor herein, and move the court to dismiss the appeal of Bliss O. Wilcox, claimant herein, and for cause say:

That by the rules of the district court governing this case appeals in admiralty from the district to the circuit court must be taken within ten days from the date of the decree in the district court, unless further time be given by special order of the judge; that by order of the judge the time of claimant herein for perfecting his appeal herein was extended to twenty days from the date of the final decree in the district court, to wit, December 26th, 1877, and expired on the 15th day of January, A. D. 1878, at which time no appeal had been filed or perfected herein by said claimant, and in fact no appeal was filed herein until the cause was docketed and transcript filed in the circuit court, to wit, on the 27th day of February, A. D. 1878, more than a month after time, and was then filed in the circuit instead of the district court, as required by law.

385 Wherefore libellants pray that the appeal herein be dismissed,

H. L. TERRELL,

Proctor for Libellants.

Filed M'ch 11th, 1878.

W. G. WINSLOW ET AL.	}	Appeal in admiralty.
<i>vs.</i>		
SCHOONER S. S. OSBORN.		

Testimony of witnesses taken before Earl Bill, United States commissioner, on the 11th day of March, 1878.

By consent of parties, notice of the taking of testimony is waived.

Present, H. L. Terrell, esq., on behalf of libellants, and W. H. Condon, esq., on behalf of respondent.

Proctor for libellants objects to the taking of any testimony to be used on the hearing in the circuit court, for the reason that the pretended appeal in this case does not set out what testimony the claimant intended to take, or upon what points to be used in this court, as required by rule 23rd of the district court in admiralty.

Mrs. LIDIA WILCOX, a witness called on behalf of the respondent, being first duly sworn, was examined in chief by Mr. CONLY, and testified as follows:

386 Q. 1st. When you first went on deck after the collision between the Osborn and the American Union what is the first thing you heard?

A. I heard captain say, "What's up?" and Wesley replied that the vessel came into us on the right side.

Q. 2. Wesley who?

A. Wesley Seamans, the mate.

Q. 3. Did you hear any conversation between Charles Ingraham and Captain Parsons, a few minutes after the collision, about the Osborn's lights?

A. Yes, sir; I heard Charles Ingraham tell Captain Parsons that our lights were not rung is what deceived them.

Q. 4. What do you mean by "our lights"?

A. Why, I suppose he meant our signal-lights, I suppose.

Q. 5. The Osborn's?

A. The Osborn's signal-lights.

Q. 6. Did you hear Parsons and Chas. Ingraham say how the vessels were meeting at the time of the collision?

A. They talked about meeting end on; talked as though we met on all night; both he and his crew. There was no talk that night of meeting any other than end on.

Q. 7. Do you know how the wind was immediately after the collision?

A. I do. Very soon after—I couldn't tell just how soon—very soon after the clouds broke away and I could see the north star.

Q. 8. How did you ascertain?

A. By looking at the fly on the mainmast of the American Union. I heard them talking at that time about the wind, and looked to see myself how it was.

387 Q. 9. The fly was on the mainmast, you say?

A. Yes; that I looked at.

Q. 10. Did you see Captain Parsons and Captain Seamans examining the fly on the Osborn?

A. Yes, sir.

Q. 11. Where was the fly on the Osborn?

A. On her mizzen-mast.

Q. 12. About how soon after the collision did you ascertain how the wind was?

A. Well, I couldn't tell to a moment; it was after it cleared away; perhaps—oh, it might have been a half an hour; may be more or less; I couldn't tell exactly.

Q. 13. How was the wind then?

A. The wind was east of north.

Q. 14. Did you hear any conversation between Seamans and Parsons about the sheets of the Osborn?

A. Yes; that is the first conversation I heard them have between the two captains. It is the first conversation I heard was about the sheets. Captain Seamans said he had been closed. Parsons said, "Why, I have not closed;" "No, sir," said Captain Seamans, "I hauled the wind close; come right here and see my sheets; you can see that they are flat up, and," says he, "you see where my boom is." Then he says, "We will go right up to the binnacle and see how the wind is."

Q. 15. Who said that?

A. Captain Seamans said to Captain Parsons, "We will go right up and see how the wind is," and they went up on the quarter to the compass, and he showed them the compass and the fly. He says,
388 "You see I am right that the wind was north by east."

Q. 16. How were the sheets when they were shown as you state?

A. They were just as flat as they could be, excepting the boom had dropped down. Of course that dropped down and left them a little slack; of course they would drop down a few inches. They were just as flat as they could be excepting a very little slack.

Q. 17. Did you hear it stated after eleven o'clock on the night of the collision how the Osborn was heading at that time?

A. Yes, sir. I heard Captains Seamans ask just before he came in the cabin—ask the man at the wheel how she was heading. He said she was heading east by north half north.

(Objected to as incompetent.)

Q. 18. Do you know when sheets are flat aft on a vessel?

A. Yes, sir, I do; I know they are hauled as close as they can be hauled.

Q. 19. How was the foreboom of the Union when you got aboard of her that night?

A. It was off, over the rail, or to the rail. I had to go under it. It was off enough so that I had to go under it to go to the cabin. I went along the port side. I got over near the fore-rigging. I don't remember whether it was before or aft. I think it was before the fore-rigging where I got over—I am sure it was before the fore-rigging—and went aft to the cabin on the port side; and then I went under the foreboom; and the wind came down off of the sail and took my water-proof cloak over my head.

Q. 20. If that boom had been flat out, could you have gone under it?

389 A. No, sir; couldn't go around on the ports side—that is, to go as I went. I went along a little ways from the rail.

Q. 21. Did you hear Parsons say, after the collision, anything about doing damage to any one?

A. Yes, sir. We stood looking at the Osborn; it was after we had separated in the morning. I felt badly for the collision for Mr. Wilcox. We were talking. He said he had sailed a vessel for ten years and it was the first dollar's damage he had ever done anywhere or any one.

Q. 22. Did you hear Captain Seamans say what distance from the Beaver light the collision occurred?

A. Yes, sir. I heard both of the captains say that we were between two and three miles from Beaver light. I asked them—they were both on the Union at the time—very soon after the collision—I asked them—they stood talking—we all three stood talking together—I asked them how far we were from Beaver light, and they said, both of them, that we were between two and three miles.

Q. 23. How soon after the vessels collided did you get aboard the Union?

A. Oh, I guess a minute or two. We stepped very quick. We thought the boat was going right down under us. We didn't stop for very much ceremony. I was the last one that got off from our boat. It was—why, couldn't have been more than a minute and a half. It was just as quick as I could get aboard.

Q. 24. Did you hear any orders given on the American Union after you got aboard of her?

390 A. The first order I heard after they found that we were not sinking—it wasn't a half a minute after—I heard them tell "Sound the pumps," and then to take in the fore gaff-topsail. I saw them take in the fore gaff-topsail. I was right behind them when they took it in. That is the first sail they took in.

Q. 25. Was the mizzen taken off of the Union after the collision?

A. No, sir. There was no mizzen on her when I went on. I noticed it. I supposed it was carried away by the collision. I noticed it was gone.

Q. 26. Did you notice its condition when you went in?

A. Only that it was off, and I supposed it had been carried away by the collision.

Q. 27. How soon was that after you got aboard?

A. Right away. I went out to see if the women were aboard safe just as quick as I could go.

Q. 28. Did you notice whether they were carrying a whole mainsail or not?

A. No, sir; they were not. They had a reefed mainsail.

Q. 29. Do you remember what time your vessel left Escanaba?

A. Six o'clock in the morning—before six o'clock.

Q. 30. In the morning after the collision, I believe you stated that you saw Fox light?

A. Yes, sir.

Q. 31. Or during the night?

A. Well, I saw it. Yes, saw it in the night, and I saw it when we saw Fox Island.

Q. 32. Did you look over the bow of the Union when you saw that?

391 A. Captain Parsons and I were talking about the propeller not coming to us. He was angry, and I asked him if he thought they could see our signal of distress, and he said "Yes." He called my attention to what we could see on the propeller himself, and wanted to make out what the propeller had. We were then standing on the port bow of the Union looking across at the Osborn.

Q. 33. Looking across which bow of the Union?

A. The port bow.

Q. 34. If the Union had been heading southwest, then what bow would you have had to look over to see the propeller, if you know?

A. Why we should have had to look over the other bow.

Q. 35. Starboard bow?

A. Yes, sir; if she had been heading southwest.

Q. 36. Where were you when the Osborn's foremast fell?

A. I was on deck. I was the first one on deck, Captain Seamans right behind.

Q. 37. Where were you when the main-boom of the Osborn settled down on the roof of the cabin?

A. I was right by the cabin door; just out—may be two or three feet out. I have got a plan of the cabin. I could tell you right where I stood. This niche in here (indicating). I came out of the door right here. This (ind.) was the sitting-room. I came from the state-room right here (ind.), and stood about here (ind.), and the main-boom dropped. I was pretty near under it—not quite—when it dropped down.

Q. 38. Did you notice whether the cabin of the American Union was on deck or not?

392 A. Yes, sir; it was up on deck, wholly.

Q. 39. Were there any lights in it immediately after the collision?

A. Yes, sir. There was a little in the kitchen and a little in the dining-room, and a little in the bed-room, that is, the captain's room.

Q. 40. When did you see there were lights?

A. The time I went aboard the boat. The door was open and I saw the light. They told me to go into the door that was open there, and I went. It was in the kitchen door. The kitchen was on the port side.

No cross-examination.

Signature waived.

H. L. DORAN, a witness called on behalf of the respondent, being first duly sworn, was examined in chief by Mr. CONLY, and testified as follows:

Q. 1. What is your name, age, residence, and occupation?

A. H. L. Doran; age, 36; residence in Cleveland, at present; occupation, is a sailor—lakeman.

Q. 2. Have you been an officer of a sailing vessel; and, if so, how long?

A. I have been a master for about nine years.

Q. 3. On the lakes?

A. Yes, sir.

Q. 4. Do you know whether or not it is usual, in a 7 or 8 knot breeze, for a two-masted schooner during the night to wing out sail that way?

393 A. Well, it all depends on the surroundings. If you are in a narrow place, and can't haul up to the point, why they generally will wing out—that is, they have to do it; but if you have got an open lake for two or three miles, and can haul up, generally rather do it.

Q. 5. Instead of winging out?

A. Instead of winging out. It is rather risky business, but still, where you can't keep up the point, of course you have to wing out, because your foresail won't fill.

Q. 6. In the case of a squall, what danger is there in a vessel winging out?

A. Well, there is great danger. No prudent master will have his vessel winged out in a squall. He will always get his sheets or booms, and both, one side or the other—port or starboard—or forward if it is possible for him to do so.

Q. 7. How is it in regard to discovering those squalls at night, in comparison with day-time?

A. Of course they are not as readily discovered in the night as they are in the day time, unless he is a very watchful officer. Others are negligent. Great many losses occasioned by vessels being winged out.

Q. 8. Do you know Captain Parsons, who sailed the American Union in 1872?

A. Yes, sir; I do.

Q. 9. Did he have any conversation with you about how this case could be won?

A. Yes, sir.

Q. 10. About giving his evidence for anybody?

(Objected to as incompetent.)

394 A. The fall or the summer of the collision I was speaking with him on Main street bridge—

Q. 11. I have not asked you in regard to any conversation except where he stated how this case could be won, and what means, if any, could be adopted for that purpose.

A. Well, he approached me in Painesville.

Q. 12. When was that?

A. That was two years ago, I guess, somewheres. I have never thought of it to tell any time about it. He wanted me to go to Mr. Wilcox, and that he would—for five hundred dollars he would win him the case; and I approached Mr. Wilcox with the offer, and with my own suggestions to him not to do anything about it. He would win him the case for that much money.

No cross-examination.

Signature waived.

Mrs. MAGGIE PAINE, a witness called on behalf of the respondent—being first duly sworn, was examined in chief by Mr. CONLY and testified as follows:

Q. 1. You have testified before in regard to this collision?

A. Yes, sir.

Q. 2. Were you on board the Osborn at the time of the collision with the American Union?

A. Yes, sir.

Q. 3. Do you remember what time the Osborn left Escanaba that trip?

395 A. It was very early in the morning before we had our breakfast.

Q. 4. About what hour.

A. Well, before six o'clock. I couldn't exactly state just the very moment. That early in the morning.

Q. 5. Did you notice whether the cabin of the American Union was below deck, or on deck, or how it was built?

A. We went in through the kitchen. It was plain, the same height of the deck—the floor of the cabin and kitchen.

Q. 6. Cabin floor was same height as the deck of the vessel generally?

A. Yes, sir.

Q. 7. Do you remember whether there was any step, as you entered the cabin, up or down? Did you have to step down to get into it?

A. No, sir; I think not. I think it was perfectly level. I remember the Osborn. There was quite of a high threshold that we had to step over, and then you have one the same as that, but neither up or down.

On the Osborn there is quite a high threshold to keep the water off, I suppose, from the cabin floor.

Q. 8. How soon after the collision did you see the cabin of the American Union?

A. Very soon. It didn't take us long to get into the boat. We got on right—very close to the cabin, and as quick as I got on I went right into the cabin.

Q. 9. Were there lights in the cabin?

A. Yes; it was lit up when we went in.

396 Q. 10. Lights in more than one room of it?

A. There was a light in the kitchen as we passed through, and one in the main cabin when we went in there.

Q. 11. Could those lights be seen from forward on the vessel?

A. Well, I couldn't say about that.

Q. 12. You went on the American Union near her fore rigging, didn't you?

A. Yes, sir.

Q. 13. And went aft?

A. Went back into the cabin.

Q. 14. Did you see those lights before you got to the cabin?

A. Well, the door was open into the cabin and there was a bright light in that at that time, but whether there was windows toward the front I couldn't remember, but it was lit up when we went in.

No cross-examination.

Signature waived.

ARTHUR J. JUSTUS, a witness called on behalf of the respondent, being first duly sworn, was examined in chief by Mr. CONLY, and testified as follows:

Q. 1. Where do you reside?

A. In Painesville, Lake County, Ohio.

Q. 2. Are you acquainted with Captain Parsons, of the schooner American Union?

A. I am; yes, sir. I am acquainted with Captain Dick Parsons. I suppose he is the one.

397 Q. 3. Did you have any conversation with him in regard to the collision between the American Union and the S. S. Osborn?

A. I did; yes sir.

Q. 4. When?

A. It was, I think, the last of April in 1876.

Q. 5. Where?

A. At Painesville.

Q. 6. What did he say to you then?

(Objected to as incompetent.)

Q. What was the conversation?

A. He said to me there that Mr. Wilcox had the right of the suit, and that if he would do what was fair by him, he could win the suit for him.

Q. 7. Did he state what business he was there in Painesville on?

A. That he was there looking up the matter of the Osborn and the collision to see what he could find out about it.

No cross-examination.

Signature waived.

ROBERT MOTT, a witness called on behalf of the respondent, being first

A. No, sir; not to my knowledge.

Q. 44. Do you remember whether the cabin of the American Union was built on her deck or below her deck part of it?

A. It was on deck one step over the combing.

Q. 45. Did you notice whether there was a light in it or not
402 immediately after the vessels struck, or at the time they struck?

A. No, sir; I did not notice.

Q. 46. Did you go aboard of the Osborn that night?

A. No, sir.

Q. 47. From the deck of the Union could you see how the Osborn's booms were?

A. Yes, sir.

Q. 48. How soon after the collision did you notice the position of her booms?

A. As soon as she dropped alongside.

Q. 49. How did you find them?

A. Found them close-hauled.

Q. 50. If a man standing on the port quarter of the American Union was to look forward and see a light about two points on her lee bow, and had to look under the main-boom of the Union, what would that indicate in regard to the position of the boom?

(Objected to as incompetent.)

A. Indicate that the wind was free.

Q. 51. Where would the boom be?

A. Well, I don't exactly understand you. It would be off over the rail.

Cross-examination by Mr. TERRELL:

X Q. 1. You say you were the lookout of the American Union at the time of this collision, do you, Mott?

A. Yes, sir.

X Q. 2. Do you say that you were present when the protest was made at Escanaba, or don't you remember whether you were or not?

403 A. I said I was not present.

Q. 3. Weren't there at all?

A. I was there when they signed it.

Q. 4. You weren't there when it was written?

A. No, sir.

Q. 5. After the collision where did you go?

A. Dropped alongside the Osborn.

Q. 6. No, no; where did you go to? Did you go on up to Escanaba?

A. Yes, sir.

Q. 7. And then you came back here?

A. Yes, sir.

Q. 8. Remember when you got back here?

A. No; I don't remember the date.

Q. 9. Remember the date of the collision?

A. No, sir; I don't remember the date.

Q. 10. Well, you went on to Escanaba; took in a load there?

A. Yes.

Q. 11. Came back here?

A. Yes.

Q. 12. After you got back here did you go up to our office with the balance of the crew?

A. I went up to some office; I don't know whose it was.

Q. 13. Across here at 81 Public square, lawyer's office?

A. Yes, sir.

Q. 14. Was there a statement taken there of yourself and others of the crew?

A. I don't remember of hearing any statement read to me there.

Q. 15. Was there any taken there of anybody—of the captain or any of the men?

A. I don't know anything about it.

404 Q. 16. What did you go there for?

A. Well, I went there, I suppose, to sign some paper.

Q. 17. And you went there to make a statement—tell what you knew about the collision, too, didn't you?

A. I didn't understand it in that way.

Q. 18. You understood that you went there to sign some paper?

A. Yes, and that is all.

Q. You don't know what that paper was called?

A. No, sir; I didn't then.

Q. 20. Do you know whether you signed it or not?

A. Yes, sir.

Q. 21. Did you sign it?

A. No, sir; not with my own hand.

Q. 22. Did you make your mark to it?

A. No, sir.

Q. 23. Did you go through the motions of signing it at all?

A. No, sir; I stood away from where it was signed.

Q. 24. Were you asked to sign it?

A. Asked me to sign it? Yes, sir; and I told them I couldn't write; they could write it if they wanted to.

Q. 25. Didn't touch the pen?

A. No, sir.

Q. 26. Didn't say that the statement was all right?

A. No, sir; didn't say nothing about it.

Q. 27. Wasn't read over to you?

A. Don't remember of hearing it read.

Q. 28. Didn't you hold up your hand and swear?

A. I don't remember as I did.

Q. 29. Well, do you say as you didn't?

A. I can't say as I did or did not, because I don't remember.

Q. 30. I just wish you would look at that paper (handing it to the witness), and see if you made your mark to that paper.

405 A. I don't see any mark that I made, sir.

Q. 31. Do you swear that you did not make the mark in between your name there at the bottom?

A. Yes.

Q. 32. You did not make it?

A. Yes.

Q. 33. Well, when you say "yes," you mean to say that you did not make it?

A. I mean to say that I don't remember anything about it.

Q. 34. Did you have any conversation with me there?

A. I don't remember.

Q. 35. Did you have any conversation with any lawyer there?

A. No, sir.

Q. 36. Not at all?

A. No, sir.

Q. 37. You had no conversation, then, with me or any other lawyer at that office?

A. Not that I remember of.

Q. 38. Didn't you tell me there at that time that at the time of this collision the American Union was close-hauled.

A. No, sir; I don't remember telling you any such thing.

Q. 39. Didn't you tell me that you made the green light of the Osborn two points over your port bow?

A. No, sir; I don't remember telling you any such thing as that.

Q. 40. You don't remember? Will you swear that you didn't?

A. Well, I don't see that a man can swear that he didn't
406 when he don't remember.

Q. 41. Then that is the most you can say; you don't remember whether you did or not?

A. Yes.

Q. 42. Didn't you state to me there that the wind was northwest by north at the time of the collision, and had been for some time before it?

A. No, sir; I did not.

Q. 43. Didn't you swear there at that time that you had read over this statement?

A. No, sir; I did not.

Q. 44. No' I will ask you if you did not sign by your mark this protest which I have shown you, and did not swear that you had read it over, and that the statements contained in it were true?

(Protest dated August 21st, 1872, and filed May 1st, 1877, being the protest of the American Union in this cause in the district court, is exhibited to witness, and is made a part of this cross-examination.)

A. Well, I don't clearly understand you, what you want to ask.

Q. 45. You say you understood you went up there to sign something?

A. Yes, sir.

Q. 46. Well, I want to ask you just this, if, when you were over there to the law office, you did not swear that you had read over this protest which I have shown you, and that the statements contained in it were true? Didn't you so swear over there?

A. No, sir.

407 Redirect examination by Mr. CONLY:

Q. 52. Did you read over any protest in a law office here in Cleveland, at that time referred to?

A. No, sir.

Q. 53. Did you hear any read?

A. No, sir.

CLIFTON B. BEACH, a witness called on behalf of the libellants, being first duly sworn, was examined in chief by Mr. TERRELL, and testified as follows:

Q. 1. State your age.

A. 32 lawful age, you might say.

Q. 2. Residence?

A. Cleveland, Ohio.

Q. 3. Occupation?

A. Attorney at law.

Q. 4. In what office were you in August, 1872?

A. Office of Willey, Cary and Terrell.

Q. 5. As a student?

A. As a student.

Q. 6. And state whether you were a notary public at that time.

A. I was also a notary public.

Q. 7. State whether the protest of the crew of the American Union was taken before you.

A. It was acknowledged before me.

Q. 8. Look at the protest referred to in the cross-examination of the witness Mott, and state whether that is the original protest of the officers and crew of the schooner American Union, taken before you?

A. It is.

Q. 9. State whether Robert Mott, the lookout of the American Union, swore to that protest before you.

A. It would be difficult for me to swear that any of the witnesses whose names appear upon this protest, from my recollection of the event, did actually swear to it; I think, however, that there is no doubt (there is no doubt in my mind) but that all of the parties whose names are attached to the protest were sworn, and did certify to the truth of the statements in the protest.

Q. 10. State whether you remember the name of Robert Mott, as being the name of one of the parties who was present at that time?

A. I do; very distinctly.

Q. 11. State whether this protest was read over to the parties who subscribed and swore to it.

A. My best recollection is that the protest was read to these parties, and I should say that it was read from this fact alone that I have so certified.

Cross-examination by Mr. CONDON:

X Q. 1. Where and how have you certified to the fact that this protest was read over to Robert Mott?

A. In the notary's certificate, being part of the blank protest.

X Q. 2. Aside from that, can you swear from your recollection that that protest was read over to Robert Mott?

A. I will answer that directly first by saying no. I wish to modify that a little, however, by saying that in certifying to a great number of documents, as I did while in the office of Willey, Cary and Terrell, it is impossible for me to recollect positively all of the events and circumstances connected with the execution of each paper; that I am entirely satisfied in my own mind that the protest was read to these witnesses, that they were given a fair opportunity to know and understand the statements of the protest, and that they swore to the same before me with such knowledge, and that I have no doubt but that Robert Mott executed or signed the statement as it appears as present.

X Q. 3. The protest is not in your handwriting, is it?

A. The body of it is not; no, sir, simply the certificate.

X Q. 4. By that you mean the jurat?

A. Well, I believe some of the filling in of the blanks of the certificate were mine too. No, just the jurat; that is so; and the words "his mark."

Q. 5. Am I to understand, and do you wish to convey the idea to the court, by your explanation added to your direct reply to the second cross-interrogatory, that you wish to swear to anything positively as to what is contained in the acts stated by you in this jurat and "his mark" to Mott's signature?

A. I am only able to swear positively from my recollection at present of the circumstances to what appears upon the certificate of protest; I

am not able to swear positively that the protest was read over to any of the parties who signed it; nor am I able to swear positively that the signatures to the protest were written by the parties themselves. My best recollection and opinion, however, is, that it was executed as
 410 it purports to be, and that the protest was read over to the parties.

X Q. 6. And your opinion that it was read over to the parties, I understand you to have said, is based upon the fact, as you claim, that you have certified to that effect in this protest?

A. I have so stated, or rather I have stated that the fact alone of my having certified to the protest in the form there is sufficient to satisfy my mind that all that is claimed to have been done was actually done. I say I state that as one reason. I have also a recollection—not, however, sufficiently positive to make me feel like swearing to it—that the protest was read over to all the parties and signed by all the parties, and that the words “his mark” over the signature of Robert Mott were written by myself. I remember further that Mott was the only man of the crew who was unable to write his name. That appears upon the record; but since I have thought it over, it comes back to me that he was the only man there that could not write his name.

X Q. 7. Well, do you understand that this protest, or any statement in it, is to the effect that you certified that it was read over to these witnesses, or any of them?

A. No, I do not.

X Q. 8. All you do is certify that they swore to it before you?

A. That is all.

X Q. 9. Now, do you remember anything about what time of the day or what day of the week that was done?

A. Do not, sir.

X Q. 10. Any of the circumstances?

411 A. Simply that I know that the office was full of sailors.

X Q. 11. Do you know whether you were in the room when they signed it or not?

A. Yes.

X Q. 12. All of them?

A. Don't know that.

X Q. 13. Do you know whether you heard anything more about it than that you were called in to swear the witnesses to it?

A. Yes; I know that I heard the substance of these statements—the statements of the protest talked over at length between Mr. Terrell and the captain and crew of the American Union.

X Q. 14. You have acted as attorney in this case, haven't you?

A. No, sir.

X Q. 15. Didn't you go to South Haven to take the deposition of Burns?

A. No, sir.

X Q. 16. Weren't you present at the taking of that deposition?

A. No.

H. L. TERRELL, being duly sworn, testified on behalf of the libellants as follows:

I wish to make a statement in respect to this protest—first, that it is in my handwriting, and that I personally took the statements of the officers and the crew; that before the protest was drawn I conversed with each member of the crew separately and took each one's version of the collision; that after that I drew up this protest; that after I

412 had drawn it up I called them all into the same room together, told them that I was going to read them the protest, and wanted to have them listen to it, and that I read it to them; that Robert Mott was present, together with the balance of them; that I then told them to go into the first room, at Mr. Willey's desk, where, I think, Mr. Beach was then sitting, and sign the protest; that all the others except Robert Mott subscribed each his own name, and that when I called upon Robert Mott to sign he said he could not write his name; I told him I would write it for him; that I wrote the name of Robert Mott, and he made his own mark; that prior to the drawing of the protest I had a conversation with Robert Mott in respect to the collision. I remember him well, and knew who he was when he came into the room this afternoon, and that in his statement to me prior to the writing of this protest he told me unequivocally that the American Union was close-hauled at the time of this collision, and had been for some time prior; that her sheets were hauled aft when she rounded Beaver Island. He also told me that the wind was northwest by north; and he also told me that he, as lookout, made the green light over the port bow. This was on the same day that the protest was signed and executed. I cannot say how long; but the master and crew were there some time; several hours possibly.

Cross-examination by Mr. CONLY:

X Q. 1. Was there anything about Robert Mott's statement which attracted your attention more than any of the rest of the crew?

A. No, sir.

X Q. 2. Can you recollect what every member of the crew said to you?

413 A. I can't recollect the exact language; no, sir. I recollect the substance of it. I can recollect this, however—that there was not a particle of disagreement from the captain to the cook through the whole crew—that they every one told the same story to me.

X Q. 3. That is how you come to state that Robert Mott stated these things?

A. No, sir. I remember him just as well as I remembered you when I saw you to-day, and, of course, while I cannot give the exact conversation after this lapse of time, I do remember the substance of the statements of each of those men. I remember his stating when the vessels got pretty near together he started from the lookout and ran aft; I remember his stating that to me in that conversation.

X Q. 4. Well, you remember that it was stated by the crew that the Union's sheets were flat aft, and that the Osborn's lights bore two points on the lee bow.

A. I would not swear that each one of them said two points on the lee bow. They all of them said on the port bow. That, to my present recollection, would not enable me to say that each one of them said two points on the port bow. However, all of them said on the port bow.

X Q. 5. Your recollection is that this protest was drawn by you as the substance of the statements of all of them?

A. Oh, yes, sir; I think that there are one or two things, possibly, stated in the protest that all of them didn't know; but upon those points—upon their being close-hauled, and upon the direction of the wind, and upon making the light over their port bow—that was something they all recollected, as far as their statements were taken; recollected seeing the light on the port bow when they saw it. Of course

they didn't all claim that they made it instantaneously at the same time.

X Q. 6. Did you write out the statement of each witness in regard to the collision at that time?

A. My recollection is that I did not.

X Q. 7. Can you swear whether they were all present when this original protest was written down by you?

A. What do you mean, all in the room?

X Q. 8. Yes, sir.

A. Oh, I couldn't swear that they were all in the room during all of the time I was writing, of course not. They might have stepped out to the front door, or out in the hall.

X Q. 9. Some may have been left on the vessel and sent for?

A. Oh, I think not; I think they were all about at that time.

X Q. 10. Is your recollection any more definite than this, that when the statement was drawn up as it is in that protest, and you say read to them, none of them made any objections to it nor found fault with it?

A. I don't know that I get the exact import of the question.

X Q. 11. (Question read.)

A. Well, that is true; when it was read none of them did make any objection or find fault. I remember other things; I remember talking with every man of them separately, if that is what you mean. If it was pertinent to the inquiry I could tell you why, too.

X Q. 12. You recollect what the others said, as well as what Mott said?

A. Oh, the substance of it, yes.

X Q. 13. And the substance of your testimony in regard to that would be that his statement did not differ materially from any of the rest?

A. On the points that he covered it would not. It was substantially the same.

Filed M'ch 12th, 1878.

415 *Appeal dismissed.—Order entered January term, A. D. 1878.*

This cause came on to be heard upon the motion of the libellants to dismiss the appeal of Bliss O. Wilcox, claimant and appellant, and was argued by counsel; and the court, the honorable John Baxter, circuit judge, presiding, being fully advised in the premises, doth find that the appeal herein was not perfected according to law, inasmuch as no appeal in writing, as provided in the 23rd rule of the district court in admiralty, was filed by the appellant within the time prescribed by the special order of the district court in said cause.

And thereupon the court doth order that the motion to dismiss said appeal be sustained, and that said appeal be, and the same hereby is, dismissed.

Filed March 12th, 1878.

416 *Motion to vacate order of dismissal.*

In the circuit court of the United States for the northern district of Ohio.

WM. G. WINSLOW AND H. J. WINSLOW, LI- bellants,	} Appeal in admiralty. Motion to vacate order of dismissal.
vs.	
SCHOONER S. S. OSBOEN, BLISS O. WILCOX, claimant.	

Now comes the said Bliss O. Wilcox, appellant, by Prentiss and

Vorce, his proctors, and moves the court here to vacate and set aside the order and judgment dismissing the appeal in this cause, and to reinstate this cause upon the docket for trial in this court; and for cause for granting this motion the said appellant avers and shows to the court as follows, to wit:

1st. That from the time of the giving of the appeal bond in this cause, on the 12th day of January, 1878, the libellants and their proctors have well-known that the said bond was so given, and that the transcript of the record was being prepared herein to be filed in this court in pursuance of the appeal of this cause to this court, and that the said record was duly filed in this court on the 26th day of February, A. D. 1878.

417 That they have also well known during the time above named that the appellant intended to make new and additional proofs in this cause in this court on such appeal.

That during all the time above named it has been understood and agreed between the proctors for the libellants and the proctors for the appellant, that this cause should be tried in this court at the present term thereof; and in pursuance of such understanding, it was agreed between the proctors for appellant and proctors for libellants on Monday, March 4th, when this cause was called for trial, that the same should be tried on Monday, March 11th, or the following day.

That, in pursuance of such understanding and agreement, the proctors for the libellants agreed with the proctors for the appellant, about 10 o'clock a. m. of Monday, March 11th, to attend to the taking of new testimony in this case at 2 o'clock p. m. of that day, and did accordingly attend to the taking of the same on behalf of the appellant, and also introduced new evidence in behalf of said libellants before the commissioner before whom said testimony was taken.

That neither said libellants or their proctors have been in any respect misled or prejudiced.

That, in accordance with said understanding, the appellant has gone to great expense in preparing for the trial of this cause, and was then ready for trial.

418 2nd. That this cause was duly appealed to this court and bond duly given therein on the 12th day of January, 1878, and the record therein duly filed in this court on the 26th day of February, 1878; and that no evidence was introduced, or admissions made in support of the motion filed by the libellants for the dismissal of the appeal in this case, and that the allegations of the same that no appeal was filed or perfected in said district court are untrue.

3rd. That the court erred in the granting of said motion to dismiss, and in dismissing the appeal in this case.

PRENTISS AND VARCE,
Proctors for Appellant.

Filed March 15th, 1878.

Affidavit on motion to reinstate appeal.

U. S. circuit court, northern district of Ohio, ss. In admiralty.

W. G. AND H. J. WINSLOW }
vs. } Affidavit.
SCHOONER S. S. OSBORN. }

NORTHERN DISTRICT OF OHIO, ss:

CHARLES H. BILL, being duly sworn, says:

That he is, and for several years last past has been, deputy clerk of

the district court of the United States for the northern district of Ohio.

That in the above-entitled cause, when in the district court, no appeal in writing was filed within twenty days from the date of
419 the final decree therein in said district court, viz, December 26th, A. D. 1877, nor has any appeal in writing ever up to this date, been filed in said district court by Bliss O. Wilcox, claimant and appellant, or by any other person whomsoever.

That, on the 27th day of February, 1878, and not before, as appears by the files of this case in this court, an appeal in writing was filed in this court in this case, which is the only appeal in writing, or paper purporting to be such, ever filed in this cause in either the district or circuit court for this district by Bliss O. Wilcox, appellant, or by any other person whomsoever.

CHARLES H. BILL.

Sworn to and subscribed before me this 16th day of March, A. D. 1878.

GEO. WYMAN,
Commissioner Circuit Court, Northern District of Ohio.

Filed March 16th, 1878.

Order dismissing appeal set aside.

And afterwards, at the January term, A. D. 1878, of said court, to wit, on March 16th, the following order was entered:

This cause came on to be heard upon the motion of Bliss O. Wilcox, claimant of said Schooner S. S. Osborn and appellant, to set
420 aside and vacate the order of this court, dismissing his said appeal made and entered on the 12th instant, and the affidavits in support of said motion, and was argued by the proctors of the respective parties.

On consideration whereof, the court, the honorable circuit judge presiding, doth find that, notwithstanding said appeal was not perfected in accordance with the rules of said district court, yet the court, being of opinion that the irregularity in said appeal has been waived by the appellee, doth order that this cause be reinstated on the docket of this court; and thereupon come said appellees, by Mr. Terrell, their proctor, and excepts to the said ruling and order of the court; and it is further ordered that both parties be allowed to take new testimony to be used on the trial of this cause; and this cause is continued to the next term of this court.

421 And afterwards, to wit, on March 29th, 1878, in the city of Chicago, before W. A. Ruff, a notary public, the following testimony was taken:

JOHN G. KIETH, a witness on behalf of the appellant, having been first duly sworn, was examined in chief by WM. H. CONDON, Esq., and testified as follows:

Q. 1. What is your name, age, residence, and occupation?

A. John G. Kieth; age, 34 or '5; reside at Chicago; and occupation, a vessel-maker.

Q. Did you know the schooner Wm. Sanderson?

A. I did know her.

Q. Have you ever cleared from Duncan City; and if year, about how often?

A. I have cleared from Sheboygan—which is the same as Duncan City,

one custom-house answering both places, which are only about two miles apart—possibly about eight times, I should say. I was there and loaded and cleared in 1872.

Q. Did you know anything about the sailing qualities of the Sanderson, about the speed she could attain, whether she was a fast-sailing vessel or not?

A. She was not considered a fast-sailing vessel of her class, and of an inferior class for sailing qualities, being known as a canal vessel.

Q. If the schooner Wm. Sanderson cleared from Duncan City on August 9th, 1872, could she have with a southwest wind sailed to Sand Bay by 10 o'clock in the forenoon of that day?

A. No, sir.

Q. Why not?

422 A. For the reason the distance is too great, being about 56 miles, and wind being ahead, it was an utter impossibility.

Q. Did you know the schooners American Union and S. S. Osborn in 1872?

A. Yes, sir; I have known them from their existence as vessels.

Q. Suppose that the Osborn and the American Union, one bound for Escanaba and the other for Erie, were to meet about four miles westward of Beaver Island light; that the Osborn were loaded with iron ore and was without canvas, carrying no canvas; and that the American Union was under short canvas, with reef mainsail and no mizzen, and being light, were lashed alongside the Osborn, her bow to the Osborn's stern; and that her wheel were lashed hard down, and that they were drifting for about four hours in that condition, that the vessels were within about four miles of the dock on the South Fox, how was the wind while they were so drifting?

A. The wind would be from north to north northeast.

Q. If the wind had been northwest by north during that time while they were so lashed together, where would the vessels have gone to during those four hours?

A. They would drift in a southeast by south direction from the point of collision, which would be towards Traverse Bay, and eleven or twelve miles east of South Fox Island.

Q. Would not having no mizzen-mast on the Union and carrying her foresail, reef' mainsail, two jibs and fore-gaff topsails, have a tendency to make her head pay off before the wind?

A. It would have that tendency.

Q. Which would those vessels drift or headreach most lashed together and carrying canvas as stated in the previous question?

A. It would be all drift, and little or no headreaching.

Q. Did you know the schooner Philo Scorrille in 1872?

A. I did.

Q. What was her rig at that time?

A. What was known as a fore-aft two-mast schooner.

Q. Do you know whether she had any squaresail or not?

A. I couldn't say, but I think she had a squaresail.

Q. If such a schooner were on a voyage from Buffalo to Chicago, and were two or three miles to southward of South Manitou Island and had a sever or eight knot breeze from north, or north by east, would she wing out at or would she keep both her booms on one side if she was sailed with ordinary prudence?

A. It wouldn't be considered good seamanship to wing a vessel out of her size and rig.

Q. Why not?

A. For the reason that when a vessel is winged out that has a boom on each side you then have two evils to guard against, where with them on one side you have but one, a vessel winged out can vary but a point or two until her sails would jibe; and in that case would incur the risk of breaking the booms, tearing the sails and dismasting the vessel, and in meeting vessels you haven't the same liberty to deviate from your course to avoid them, and in a dark night it is always considered a proper and safe way to guard the booms both on one side.

Q. In the case of a vessel bound to Chicago, with the wind either north or north by east, would she ordinarily steer her course, which was south by west half west?

A. No, sir.

Q. Why not?

A. It is always customary and necessary to have your vessel a couple of points to either side so as all sails will draw.

Q. If a vessel bound from Rocky Island passage to Beaver Island is to leeward of her course when back of the North Fox and is hauled up northeast, and her mainsail shakes, and she is kept east northeast, and sails on that course for an hour and a half, the vessel being able to sail within five and a half or six points to the wind, in what direction had she the wind during that time?

A. She had the wind from the north to north by east.

Q. If she were to the leeward of her course, would she ordinarily sail as close to the wind as she could until she made up her leeway?

A. Yes, sir.

Q. If the wind were northwest by north, would the mainsail of the vessel stated shake when hauled up northeast?

A. It should not.

Q. Why?

425 A. Because she would be seven points from the wind, or have the wind a point and a half free.

Q. In the case of the vessel supposed, if she were to pass Beaver light about a mile and a half distant, and were to sail by the wind on the port tack and should in two hours have the Skilgale light one point on her weather bow, what course must she have steered from off Beaver light?

A. An east-northeast course.

Q. If a vessel while sailing by the wind breaks off her course half a point, how does that indicate that the wind has changed?

A. A like amount, as the wind in both cases would be the governing influence.

JNO. G. KEITH.

Subscribed and sworn to before me this day of , A. D. 1878.
W. A. RUFF, [SEAL.]
Notary Public.

JOHN SUTHERLAND, the next witness called, having been first duly sworn, was examined in chief by WM. H. CONDON, Esq., and testified as follows:

Q. State your name, age, residence, and occupation.

A. John Sutherland; age, 43; reside in Chicago, and by occupation master of a vessel.

Q. How long have you been a master of vessels?

A. About eight or nine years.

Q. How long have you sailed, altogether, on the lakes?

426 A. Going on 23 years.

Q. Did you know the schooner Wm. Sanderson, and her qualities as a fast or slow sailing vessel?

A. I have known her, and her general character was that she was a very poor sailer.

Q. If she cleared from Duncan City on August 9th, 1872, could she with a southwest wind have sailed to Sand Bay by ten o'clock in the forenoon of that day?

A. I am satisfied she never could.

Q. Why?

A. Because the distance is too great—it being about 55 or 56 miles from Duncan City to Sand Bay.

Q. Did you know the schooners American Union and S. S. Osborn in 1872?

A. I have known them ever since they came out.

Q. Suppose that the Osborn and the American Union, one bound for Escanaba and the other for Erie, were to meet about four miles to westward of Beaver Island light; that the Osborn were loaded with iron-ore, and was without canvas, carrying no canvas, and that the American Union was under short canvas, with reef mainsail and no mizzen, and being light were lashed alongside the Osborn, her bow to the Osborn's stern, and that her wheel were lashed hard down, and that after drifting for about four hours in that condition that the vessels were within about four miles of the dock on the South Fox, how was the wind while they were so drifting?

427 A. The wind must have been about north by east or north northeast to drift in the manner they drifted.

Q. If the wind had been northwest by north during that time, while they were so lashed together, where would the vessels have gone to during those four hours?

A. They would have drifted over towards Cathead Point . Traverse Bay.

Q. Would not having no mizzen on the Union and carrying her fore-sail, reef' mainsail, two jibs, and fore-gaff topsail have a tendency to make her head before the wind?

A. It would have.

Q. Which would those vessels drift or headreach the most, lashed together and carrying the canvas stated in the previous questions?

A. I am satisfied that two vessels in the condition mentioned would drift (10) ten miles to leeward for every mile they would headreach or go ahead.

Q. Did you know the schooner Philo Scoville in 1872?

A. I did. I have been often in company with her between here and Buffalo.

Q. What was her rig at that time?

A. She was a two-masted schooner, full rigged, square sail and reef'ee sail.

Q. If a schooner of that rig were on a voyage from Buffalo to Chicago, and were to the southward of South Main'awa Island two or three miles, and had a 7 or 8 knot breeze from north, or north by east, would she wing out or would she keep both her booms on one side?

428 A. She would certainly keep both booms on one side.

Q. Why?

A. Because winging a vessel out is a dangerous condition to have a vessel in. There is danger of jibing her sail, and it is hard to avoid

vessels that you may meet, in that condition with the sails, because you can't vary her course much without causing damage by the jibing sails.

Q. What damage is likely to accu' by jibing of sails when winged out?

A. Breaking of booms and also dismasting the vessel. It has happened frequently.

Q. In the case of a vessel as described in the 3rd previous question, having the wind north or north by east, bound for Chicago, if she had both her booms on the same side, would she ordinarily steer her course south by west half west?

A. She would not.

Q. Why not? And about what course would she steer?

A. Because the wind would be so much after her that the mainsail would be calmed—all the sails forward of it. It is a general practice to alter the vessel's course to either side of the true course so that all her sails will draw, that is, about a point and a half or two points.

Q. If a vessel bound from Rocky Island passage to Beaver Island is to leeward of her course when back of the North Fox, and is hauled up northeast, and her mainsail shakes and she is kept east northeast, 429 and sails on that course for an hour and a half, the vessel being able to sail within $5\frac{1}{2}$ or 6 points to the wind, in what direction was the wind during that time?

A. The wind must have been north or north by east.

Q. If she were to leeward of her course, would she ordinarily sail as close to the wind as she could till she got on her course?

A. She certainly would have to do so in that neighborhood if she didn't want to get ashore on the North Fox.

Q. If the wind were northwest by north, would the mainsail of the vessel stated shake when hauled up northeast?

A. It would not, because she would be seven points from the point where the wind blows from, and she would have it from a point to a point and a half free.

Q. In the case of the vessel supposed, if she were to pass Beaver light about a mile and a half distant, and were to sail by the wind on the port tack, should in two hours have the Skiligalee light one point on her weather bow, what course must she have steered from off Beaver light?

A. She must be making about an east-northeast course.

Q. If a vessel sailing by the wind breaks off from her course half a point, how much does that indicate that the wind changed?

A. It indicates that the wind has shifted half a point.

CAPTAIN J. SUTHERLAND.

430 Subscribed and sworn to before me this 29th day of March, A. D. 1878.

WM. RUFF, *Notary Public.*

PETER McCULLOUGH, the next witness called, having been first duly sworn, was examined in chief by Mr. CONDON, and testified as follows:

Q. State your name, age, residence, and your occupation.

A. Peter McCullough; age, 45; residence, Chicago, and master of vessel by occupation.

Q. How long have you sailed, in all capacities?

A. 30 years.

Q. How long have you been master of a vessel?

A. Six years.

Q. How long mate?

A. About five years on the lakes, and several years on salt water.

Q. Did you know the schooner Wm. Sanderson?

A. Yes, sir.

Q. What kind of a sailer was she?

A. Well, she was generally considered a pretty dull sailer of her class; she was a canal schooner.

Q. If she cleared from Duncan City on Aug. 9th, 1872, could she with a southwest wind have sailed to Sand Bay by ten o'clock in the forenoon of that day?

A. No, sir.

Q. Why not?

431 A. The distance is too far for a vessel of her capacity and sailing qualities to reach that distance with a partially heavy wind.

Q. Did you know the schooner American Union, and S. S. Osborn in the year 1872?

A. Yes, sir.

Q. Suppose that the Osborn and the American Union, one bound for Escanaba and the other for Erie, were to meet about four miles to the westward of Beaver Island light; that the Osborn were loaded with iron-ore, and was without canvas, and that the American Union was under short canvas, with reef mainsail and no mizzen, and being light under lashed alongside the Osborn, her bow to the Osborn's stern, and that the Union's wheel was lashed hard down, and that after drifting for about four hours in that condition, that the vessels were within about four miles of the dock on the South Fox, how would you say the wind was during those four hours?

A. Well, to the best of my judgment, the wind must have been from north by east to northeast.

Q. If the wind had been northwest by north during that time, while they were so lashed together, where would the vessels have gone to during those four hours?

A. They must have drifted toward Cathead Point or Traverse Bay, with the wind in that direction in those four hours.

Q. Would the fact of the Union carrying no mizzen, and carrying her foresail and reef mainsail, fore-gaff topsail, and two jibs have
432 a tendency to make her head pay off before the wind?

A. Yes, sir.

Q. Which would those vessels drift or headreach most, lashed together, carrying canvas as stated in the previous questions, being in the condition stated?

A. Well, I think it would be all drift and very little headreaching.

Q. Did you know the schooner Phil Schoville, in 1872?

A. Yes, sir.

Q. What was her rig at that time?

A. She was a fore-aft two-masted schooner.

Q. Do you know whether she had any squaresail or not?

A. She carried a squaresail and raffer.

Q. If a schooner of that rig were on a voyage from Buffalo to Chicago, and were two or three miles to the southward of South Manitou Island, and had a seven or eight knot breeze from north or north by east, would she wing out?

A. No, sir.

Q. Why not?

A. It is considered not safe to wing out a schooner of that class.

Q. What dangers attend it?

A. There is danger of jibing, carrying away her booms, tearing sails, and dismasting the vessel.

Q. Is it easy to get canvas off a vessel when she is winged out, in case of a squall?

433 A. No, sir; it is much more difficult to handle a vessel winged out than when both booms are on one side.

Q. How is it in regard to her ability to avoid vessels she is meeting when winged out?

A. She is liable to jib and alter her course a point or two points, apt to jib over and do damage.

Q. When a two-masted schooner bound from, say, South Maintowa Island to Chicago has a seven or eight knot breeze from north or north by east, if she carry both her booms on the same side, would she ordinarily steer her course, which is south, south by west half west?

A. No, sir; she would alter her course from a point and a half to two points.

Q. For what purpose?

A. To keep the sails dry.

Q. If a vessel bound from Rocky Island Passage to Beaver Island is to leeward of her course when back of the North Fox, and is hauled up northeast, and her mainsail shakes and she kept east northeast, and sails on that course for an hour and a half, the vessel being able to sail five and a half or six points to the wind, what direction does that indicate that she has the wind?

A. About north, or north half east.

Q. If she were leeward of her course would she ordinarily sail as close to the wind as she could to overcome that leeway and get on her course?

434 A. Yes, sir; she would get on her proper course.

Q. If the wind were northwest by north would the mainsail of the vessel stated shake when hauled up northeast?

A. No.

Q. Why not?

A. She would be a point or a point and a half free.

Q. In the case of the vessel supposed, if she were to pass Beaver Island about a mile or a mile and a half distant, and were to sail by the wind on her port tack, and should in two hours have a Skiligalle light to bear one point on her weather bow, what course must she have steered from off Beaver light?

A. Almost east northeast.

Q. If a vessel when sailing by the wind breaks off from her course a half a point, does that indicate how much the wind has changed?

A. Yes, sir; it indicates that the wind has shifted half a point.

PETER MCCOLLOUGH.

Subscribed and sworn to before me this day of , A. D. 1878.

W. A. RUFF,
Notary Public.

435

Motion to dismiss appeal.

U. S. circuit court, northern district of Ohio. In admiralty.

W. G. AND H. J. WINSLOW, }
vs. } Motion to dismiss appeal.
 SCHOONER S. S. OSBORN. }

And now come the said libellants, by R. P. Ranney and H. L. Terrell, their proctors herein, and move the court to dismiss the appeal of Bliss O. Wilcox, claimant herein, and for cause say :

That appeals in admiralty from the district to the circuit court of the United States in said district are governed and provided for by the 23rd rule of said district court in admiralty, which rule read as follows :

"Appeals in admiralty to the circuit court shall be taken within ten days from the date of the decree, unless further time be given by special order of the judge. The appeal shall be in writing and shall specify particularly from what part of the decree, if less than the whole, the appeal is taken. Also, whether it is intended to make new allegations or proofs, and, if so, what, and whether it is intended to pray for any other relief, and, if so, what; and on the trial above the appellant shall be strictly confined to the specifications in his appeal. Either or both parties may appeal in this manner, and no answer shall be re-

436 quired from the appellee, but for any irregularity he may except or move to dismiss. The appeal shall be filed with the clerk of the district court, and from that time, security having been given, it shall be considered as perfected; and it shall be the duty of said clerk, within twenty days, unless a longer time shall be allowed by the district judge, to prepare and deliver to the clerk of the circuit court, together with said appeal, the records in such case required by the 53rd rule of the Supreme Court, and when this is done so much of the case as is appealed shall be in the exclusive control of the circuit court.

"With a view to provide for the certifying of testimony in case of appeal, the court shall, unless otherwise agreed by the parties, cause all oral testimony to be reduced to writing as the trial progresses, either by the judge, the clerk, or a commissioner designated for that purpose, the cost of which shall be taxed in the bill of costs, and such testimony shall stand upon the same footing as depositions and be certified up accordingly.

"Upon written application to the court from which the appeal is to be taken, proceedings in execution may be suspended until the time for perfecting the appeal shall have elapsed. The amount of security to be given by the appellant shall be fixed by the court from which the appeal is taken, and its sufficiency shall be approved by the court if given in term time, otherwise by the clerk."

437 That, by order of the district judge, the of claimant for perfecting his appeal herein was extended to twenty days from the date of the final decree of said district court herein, to wit, December 26th, 1877, and expired on the 15th day of January, 1878, at which time no appeal in writing had been filed by said claimant, or any person in his behalf, in said district court, as required by said rule; and, in fact, no appeal in writing, or otherwise, was ever filed herein in said district court, nor was any appeal in writing ever filed in this cause until the transcript was filed and the case was docketed in this court, to wit, on the 27th day of February, 1878, one month and 12 days after the expiration of the time allowed for filing the same, and

said appeal was then filed in this court instead of said district, as required by law.

Wherefore libellants pray that the appeal herein be dismissed.

R. P. RANNEY.

WILLEY & TERRELL,

Proctors for Libellants.

Filed June 12th, 1878.

Exception and motion of Bliss O. Wilcox.

In the circuit court of the U. S. for the N. D. O.

W. G. & H. J. WINSLOW	} Exception and motion of Bliss O. Wilcox,
<i>vs.</i>	
SCH'R S. S. OSBORN.	} claimant and appellant.

438 Now comes the appellant, Bliss O. Wilcox, and excepts to the motion of said libellants filed in this cause June 12th, 1878, for the dismissal of the appeal in this cause, and moves the court here to strike said motion from the files in this cause; and for reason he says:

That on the 11th day of March, 1878, said libellants filed in this cause their motion for the dismissal of the appeal in this cause, which motion was based upon the identical grounds set up in said motion filed June 12th, 1878, and upon no other grounds.

And on the 12th day of March, 1878, said former motion to dismiss said appeal was heard and granted; and on the 12th day of March, 1878, said appellant filed in this court his motion to vacate said order of this court granting said motion and dismissing said appeal, upon the ground that the said libellants had been in no wise misled or prejudiced by any irregularity in perfecting said appeal, and had waived any such irregularity, which motion of the appellant to set aside and vacate said order dismissing said appeal was, on the 16th day of March, 1878, after full hearing upon evidence, granted, and said order dismissing said appeal was vacated and set aside, and said appeal reinstated, and this cause continued.

Whereupon appellant says that the matters set forth in the motion of said libellants filed June 12th, 1878, have already been heard and determined by this court, as by the files and records of this court in 439 this cause will appear, and that said former determination is a bar to said motion filed June 12th, 1878.

The said appellant denies the allegations of said motion filed June 12th, 1878, as to the perfecting of said appeal, and avers that said appeal was in fact perfected by him prior to the 15th day of January, by the allowance of the appeal by the said district court at the time the decree was rendered, and by the giving of bail therein prior to said 15th day of January, according to law, and by the filing of the record herein and docketing of this cause in this court at the term thereof next after the rendering of said decree in the district court, as soon as the clerk of said district court was able to make up said record ready for such filing.

Said appellant denies that his right of appeal herein can be limited or controlled by the provisions of said 23rd rule of said district court in the matter in said motion set forth, or that the filing of the papers therein named, called the appeal, is necessary in law to the perfecting of said appeal; and he avers that if the filing of such a writing in said district court can be legally required, the omission of the same is a

mere irregularity, which may be waived, and he avers that the same was waived in this cause as found and decided, as hereinbefore set forth.

PRENTISS AND VORCE,
Proctors for Appellants.

440 In the circuit court of the United States for the northern district of Ohio.

THE STATE OF OHIO,
Cuyahoga County, ss:

W. G. WINSLOW ET AL., LIBELLANTS,	}
<i>vs.</i>	
SCH'R OSBORN AND BLISS O. WILCOX,	
claimant.	

The libellants will take notice that on Friday, the 13th day of September, A. D. 1878, the above-named claimant will take the depositions of Lydia Wilcox, C. Rewell, J. E. Bailey, and sundry witnesses, to be used as evidence on the trial of the above-entitled cause, at the office of A. J. Ricks, clerk of said court, in the city of Cleveland, county of Cuyahoga, and State of Ohio, at 9 a. m. sharp of said day, and the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

PRENTISS AND VORCE,
Attorneys for Respondent and Cross-Libellant.

I acknowledge service of the above notice by copy, this 12th day of September, 1878, and waive the 24 hours' protesting against right to take depositions, and not waiving motion to dismiss.

H. L. TERRELL.

441 STATE OF OHIO,
Cuyahoga County, ss:

Charles H. Cunie, being duly sworn, on his oath says that he served the original notice within by delivering a true copy thereof to T. K. Bolton, in the office of H. L. Terrell, libellants' proctor, and leaving said copy of the within notice on said Terrell's desk in his said office, at 5 o'clock p. m. on September 11th, 1878.

CHARLES H. CUNIE.

Subscribed in my presence and sworn to before me by the said Charles H. Cunie, this 12th day of September, 1878.

JAMES LAURENCE,
Notary Public.

In the circuit court of U. S. for the northern district of Ohio, within and for the county of Cuyahoga and State of Ohio.

THE STATE OF OHIO,
Cuyahoga County, ss:

W. G. WINSLOW ET AL., LIBELLANTS,	}
<i>vs.</i>	
SCHOONER OSBORN, BLISS O. WILCOX, CLAIM-	
ant.	

The libellants will take notice that on Thursday, the 12th day of Sep-

tember, A. D. 1878, at 9 a. m., the above-named claimant will take the depositions of Lydia Wilcox, C. Rewell, J. E. Bailey, and sundry witnesses, to be used as evidence on the trial of the above-entitled cause, at the office of A. J. Ricks, clerk U. S. circuit court, in the city of
 442 Cleveland, county of Cuyahoga, and State of Ohio, at 9 o'clock a. m. sharp of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

PRENTISS AND VORCE,
Attorney for Respondent.

I acknowledge service of the above notice, by copy, this 11th day of September, 1878, at 4 p. m.

H. C. TERRELL,
Attorney for Libellants.

Circuit court of the United States, northern district of Ohio.

W. G. WINSLOW ET AL., LIBELLANTS,	} Appeal in admiralty.
<i>vs.</i>	
SCH'R OSBORN, BLISS O. WILCOX, CLAIM- ant.	

Depositions of John E. Bailey, Cornelius Rewell, and Lydia Wilcox, taken in behalf of the claimants, in pursuance of the notice hereto attached, at the clerk's office of said court, before A. J. Ricks, U. S. commissioner, on Thursday, September 12th, A. D. 1878, beginning at 4 p. m., in the city of Cleveland.

The witness JOHN E. BAILEY, a witness for claimant, being first duly sworn according to law, deposeth and saith:

Q. 1. (By proctor for claimant.) What is your name, age, residence, and occupation?

443 A. My name is John E. Bailey; my age is nearly 61; and my residence Toledo, Ohio; and my occupation is ship-builder.

Q. 2. Do you know Charles O. Ingraham, who was mate of the American Union when she collided with the schooner S. S. Osborn; and, if yea, state how long you have known him?

A. I have no acquaintance with him; never have seen him to my knowledge. I only know him by reputation.

Q. 3. Are you one of the bondsmen for the schooner S. S. Osborn in the case of Wm. G. Winslow et al. vs. the schooner S. S. Osborn, or were you in the district court?

A. Yes; I bonded her as one of the bondsmen when she was tied up.

Q. 4. Did you ever write to the said Charles O. Ingraham upon any matter connected with this case; and, if yea, when, and for what purpose?

A. I did; and I think it was in the winter of 1875-'6, or in the spring 1876. I wrote to him for the purpose of having him attend court here in Cleveland as a witness in this case, thinking that would be cheaper than to send up there to take his deposition.

Q. 5. Did you send him any money; and, if yea, how much, and for what purpose?

A. I sent him \$33.00 for the purpose of giving him some to leave with his family to keep them during his absence, and the balance to pay his expenses here. I learned he was poor.

Q. 6. Have you, or any one on your behalf, paid him any more money, or anything else of value, for coming here to give his testimony; and, if yea, how much?

444 A. He got five dollars from my wife on his way down here, and he has received nothing more from me, nor from any one else, that I know of.

Q. 7. Why did you send him that amount of money, and why did you want him to be examined on behalf of the Osborn?

A. I sent him that money because I heard he would testify favorable to the Osborn.

Q. 8. It has been stated by Wm. P. Bryan that you, or some one on your behalf, sent said Ingraham's wife, in November, 1875, a draft of \$50.00, and that said draft was payable to Ingraham's order, and that Ingraham obtained the money on it; is that statement true or false?

A. It is not true. I never sent but one draft, for \$33.00, and that I directed to him, and that was sent March 6th, 1876, and I have a memorandum to that effect made at that time.

And further deponent saith not.

JOHN E. BAILEY.

CORNELIUS REWELL, a witness for claimant, being first duly sworn according to law, deposeth and saith:

Q. 1. (By proctor for claimant.) State your name, age, occupation, and residence.

A. My name is Cornelius Rewell; aged 63 years; occupation, master of a vessel; but I am ashore this season. I reside at 68 Kinsman street, in Cleveland, Ohio.

445 Q. 2. If a vessel can sail within five points of the wind, when is she "by the wind" or "close hauled," and when has she the wind "free"?

A. She is "by the wind" or "close hauled" when she is within five points of the wind, and if she is any more points from the wind she has got the wind free, or the wind is free for her.

Q. 3. Did you know the schooner American Union and the schooner S. S. Osborn in the season of 1872?

A. I knew them, but I can't exactly say the date; I knew both of them from the time they were built.

Q. 4. Suppose both of those schooners were equal in their sailing qualities or speed, and were properly hand'ed by competent masters, and one was loaded with about a thousand tons of iron ore, which was about her full carrying capacity, and the other was light, and both were carrying all of their lower canvass, and most if not all of their upper canvas, and that they were both "by the wind" in a seven or eight knot breeze, which would go the faster, the light or the loaded vessel, and, if any faster, how much?

A. I believe that the light vessel would go about a mile an hour faster than the loaded one.

Q. 5. Suppose one of those vessels were loaded as stated in the last question, and carrying the canvas mentioned, and were "by the wind" in the same breeze, and the other being light had that wind four points free, and were carrying same canvas stated in last question, how much more, if any, difference would there be between the speed of those vessels than if both were sailing "by the wind"?

446 A. I believe there would be a mile and a half difference.

Q. 6. Suppose that a vessel bound from Poverty Passage to

Straits of Mackinaw or Erie were "by the wind," sailing east by north, with the wind north by east, that when back of the North Fox she were found to have made leeway, and were then hauled up east by north half north, and when about three or four miles to the westward of Beaver Island light she were headed northeast, what kind of seamanship would that display on the part of the officer in charge of the schooner's deck when that last change was made in her course?

A. I shouldn't call it good seamanship.

Q. 7. Why?

A. Because the schooner wouldn't clear Beaver Island sailing on that course.

Q. 8. With the wind north by east could she sail northeast?

A. No, sir.

Q. 9. If the wind were northwest by north, and a schooner were four or five miles to the westward of Beaver Island light, in a seven or eight knot breeze, what kind of seamanship would it be to head her northeast, and keep her on that course say fifteen minutes or more, supposing her to be found for Erie, the course to which is east three-quarters north?

A. If he kept her on that course she wouldn't clear the island, and, being all clear of the North Fox, there was no necessity of heading higher than east three-quarters north, which was his course,
447 and would give him the wind free, and just where he wanted it, on his quarter, which is much better than dead aft.

And further deponent saith not.

C. REWELL.

Mrs. LYDIA WILCOX, being duly sworn according to law, deposeth and saith:

Q. 1st. Were you examined in this case on or about March 11th, 1878; and, if yea, how?

A. I was examined, and my testimony taken by short-hand.

Q. 2. Did you sign your deposition after it was written out?

A. I did not.

Q. 3. Have you read it over since, and did you find it correct or otherwise?

A. I have read it over, and found it incorrect.

Q. 4. In what respects?

A. In answer to the first question I am made to say by the examiner that, "I heard captain say, 'What's up,' and Wesley replied that the vessel came into us on the right side." What I stated in answer to that question was, "I heard the captain say, 'What's up,' and Wesley replied that a vessel had run into us without any lights out." Also in answer to the 3rd question the examiner makes me say, "Yes, sir; I
448 heard Charles Ingraham tell Captain Parsons that our lights were not rung is what deceived them." What I said was: "Yes, sir; I heard Charles Ingraham tell Capt. Parsons that our lights were out wrong, and that is what deceived them."

Also in answer to the 14th question the examiner makes me say, "That Captain Seamans said he had been closed. Parsons said, 'Why I have not closed.' 'No, sir,' said Captain Seamans, 'I hauled the wind close.'" What I said was, "That Captain Seamans said he had the wind close. Parsons said, 'I had the wind close.' 'No, sir,' said Capt. Seamans, 'I had the wind close.'"

Also in answer to the 16th question, after the words "flat," he has omitted "aft," which I stated in both cases.

Also in question No 18 the reporter uses the expression "flat out," when he should have written it "flat aft."

Also in question 20 the reporter uses the expression "flat out," when he should have said "flat aft."

Also in answer to question 23 he makes me say I was the last one that got off our boat. I said I was the last of the ladies who got off our boat.

Also the words "the cabin" should be added to question No. 26.

Also in answer to question 27 he makes me say, "I went out to see if the women was aboard safe." What I said was, "I went in the cabin to see if the women were safe."

449 Also in answer to question 32 he makes me say: "Wanted to make out what the propeller had." I said, "Wanted to make out what propeller it was." And at the end of the answer he makes me say, "Looking across at the Osborn." What I said was, "Looking across the Osborn's quarter."

Also in answer to question 39 he makes me say "little" in three instances where I said "light."

And further witness deposeth not.

LYDIA WILCOX.

UNITED STATES OF AMERICA,

Cleveland, Ohio, N. D. O. :

I, A. J. Ricks, circuit court commissioner within and for the northern district of Ohio, do hereby certify that on the 12th day of September, A. D. 1878, at the office of the clerk of the circuit court of the United States, at Cleveland, Ohio, in said district, present proctor for claimant, personally appeared John E. Bailey, Cornelius Rewell, and Lydia Wilcox, witnesses to testify on behalf of the claimant in a certain cause now pending by appeal in the circuit court of the United States for the northern district of Ohio, wherein W. G. Winslow et al. are libellants, and the schooner Osborn and Bliss O. Wilcox are claimant.

And I d' further certify that the aforesaid witnesses were first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that their testimony was reduced by me to writing, and the same subscribed by them in my presence.

450 In testimony whereof I have hereunto affixed my official signature on this 12th day of September, A. D. 1878.

A. J. RICKS,
Circuit Court Com'r, N. D. O.

Order.

And afterwards, at the April term, A. D. 1878, of said court, to wit, on the 19th day of September, the following order was entered :

W. G. WINSLOW ET AL.	} No. 3600. Appeal in admiralty.
<i>vs.</i>	
SCH' R S. S. OSBORN, BLISS O. WILCOX, CLAIM- ant.	

In this case, on motion, the appellants have leave to withdraw their motion to strike off the motion of the appellees to dismiss the appeal, which is accordingly done.

Thereupon this case came on for hearing before honorable John Baxter, circuit judge, on the motion of the appellees to dismiss the appeal,

which motion, having been considered by the court, is overruled; to which ruling the appellees except, and hereby tender their bill of exceptions, and ask that the same be signed and sealed by the court, and made a part of the record, which is accordingly done.

451

Bill of exceptions.

Circuit court of the United States, northern district of Ohio, ss.

WM. G. WINSLOW AND H. J. WINSLOW

vs.

THE SCH'R S. S. OSBORN, BLISS O. WILCOX,
claimant and cross-libellant.

} Appeal in admiralty.

Be it remembered that on this 19th day of September, A. D. 1878, being a day in the April term of the court, this cause came on to be heard on the motion of the libellants to dismiss the appeal of Bliss O. Wilcox, claimant and owner of said schooner, respondent.

And to support said motion the libellants introduced said motion itself; which motion is hereto attached, marked "A," and made a part of this bill of exceptions.

The libellants also introduced the affidavit of C. H. Bill, which affidavit is hereto attached, marked "B," and made a part of this bill of exceptions.

And said claimant, in opposition to said motion, introduced the affidavits of C. M. Vorce, W. H. Condon, and L. Prentiss, which affidavits were filed on the motion to vacate order of dismissal and reinstate appeal, made March 15th, A. D. 1878, and are hereto attached, marked "C," "D," and "E," respectively, and made a part of this bill of exceptions.

Also the record in this case and the motion made at the January term, 1878, of this court by the appellant to vacate the order
452 dismissing the appeal, and to reinstate the same, and also the journal entry made at the said January term granting said motion of the appellant, a copy of which motion and journal entry are made a part hereof and marked Exhibits H and I.

It was also shown that the decree in this case in the district court was rendered on the 26th day of December, 1877, and that the next term of this circuit court thereafter commenced on Monday, January 7th, 1878, and continued to the first day of April, 1878, and that said journal entry granting said motion to vacate said order of dismissal was made and entered on the 16th day of March, 1878.

And to meet said affidavits of said claimant said libellants introduced the affidavit of H. L. Terrell, which affidavit is hereto attached, marked Exhibit F, and made a part of this bill of exceptions.

The libellants also introduced the preliminary objection to the taking of the depositions referred to in said affidavits introduced by claimant, tending to show that libellants objected to the taking and using of said depositions for the reason that the pretended appeal, so called, in this case does not set out what testimony the claimant intends to take, or upon what points, as required by rule 23 of the district court. No other affidavits or matters were introduced on said hearing, and thereupon the court found the rule of the district court for said district set

453 forth in said motion is therein correctly set forth, and that said rule is the only rule of said district court regulating appeals in admiralty from said district court to the circuit court in said dis-

trict, and that said rule was in force long prior to and at the time of said appeal.

The court also found that the appellant duly claimed an appeal in open court in said district court, and that the same was allowed; and that said claim and allowance were embraced in the decree in the district court; and that the bond in that appeal was duly made and filed in said district court within the time named in said decree, but the court found that no written appeal, so called in said rule 23rd, or writing of that nature, had been filed in said district court in this cause by the claimant or appellant, or by any person in his behalf; and that the time prescribed for filing such appeal in writing, so called in said rule 23, in the district court, as well as the time prescribed in the final decree of the district court herein, had elapsed.

The court found that such a writing had been filed in this court on February 27th, 1878, entitled in this court, a copy of which is hereto attached, marked Exhibit J, and made a part of this bill of exceptions; and that the clerk of the district and circuit courts were, on February 27th, 1878, and prior thereto, one and the same person, and the court further found that at the January term, , upon proofs furnished and arguments made, he had vacated an order then made for

the dismissal of said cause, which order of dismissal was for non-compliance with said rule 23 of the district court.

But the court further found that this irregularity in claimant's appeal had been waived by the libellants by reason of the matters and things set out in said affidavits.

And thereupon the court overruled said motion of libellants to dismiss said appeal, to which holding of the court that libellants had waived the irregularity of said appeal, and to which action of the court in overruling said motion to dismiss said appeal, the libellants excepted at the time in open court, and then and there tendered their bill of exceptions, which they asked might be signed and sealed by the court and made part of the record of this cause, which is done accordingly.

JNO. BAXTER, [SEAL.]

Judge, &c.

Filed September 19th, 1878.

455 *Exhibit A, referred to in bill of exceptions.*

United States court, northern district of Ohio. In admiralty.

W. G. & H. J. WINSLOW }
vs. } Motion to dismiss appeal.
 SCHOONER S. S. OSBORNE. }

And now come the said libellants, by R. P. Ranney and H. L. Terrell, their proctors herein, and move the court to dismiss the appeal of Bliss O. Wilcox, claimant herein, and for cause say:

That appeals in admiralty from the district to the circuit court of the United States in said district are governed and provided for by the 23rd rule of said district court in admiralty, which rule reads as follows:

"Appeals in admiralty to the circuit court shall be taken within ten days from the date of the decrees, unless further time be given by special order of the judge. The appeal shall be in writing, and shall specify particularly from what part of the decree, if less than the whole, the appeal is taken; also, whether it is intended to make new allegations or proofs, and, if so, what; and whether it is intended to pray for

any other relief, and, if so, what; and on the trial above the appellant shall be strictly confined to the specifications in his appeal. Either or both parties may appeal in this manner, and no answer shall be required from the appellee, but for any irregularity he may except or move to dismiss.

456 "The appeal shall be filed with the clerk of the district court, and from that time, security having been given, it shall be considered as perfected; and it shall be the duty of said clerk, within twenty days, unless a longer time shall be allowed by the district judge, to prepare and deliver to the clerk of the circuit court, together with said appeal, the records in such case required by the 53rd rule of the Supreme Court, and when this is done so much of the case as is appealed shall be in the exclusive control of the circuit court. With a view to provide for the certifying of testimony in case of appeal the court shall, unless otherwise agreed by the parties, cause all oral testimony to be reduced to writing as the trial progresses, either by the judge, the clerk, or a commissioner designated for that purpose, the cost of which shall be taxed in the bill of costs, and such testimony shall stand upon the same footing as depositions, and be certified up accordingly.

"Upon written application to the court from which the appeal is to be taken, proceedings in execution may be suspended until the time of perfecting the appeal shall have elapsed.

"The amount of security to be given by the appellants shall be fixed by the court from which the appeal is taken, and its sufficiency shall be approved by the court if given in term time, otherwise by the clerk."

"That by order of the district judge the time of claimant for perfecting his appeal herein was extended to twenty days from the
457 date of the final decree of said district court herein, to wit, December 26th, 1877, and expired on the 15th day of January, 1878, at which time no appeal in writing had been filed by said claimant, or any person in his behalf, in said district court, as required by said rule, and in fact no appeal in writing or otherwise was ever filed herein in said district court, nor was any appeal in writing ever filed in this cause until the transcript was filed and the case was docketed in this court, to wit, on the 27th day of February, 1878, one month and twelve days after the expiration of the time allowed for filing the same, and said appeal was then filed in this court instead of said district, as required by law.

Wherefore libellants pray that the appeal herein be dismissed,

R. P. RANNEY,
WILLEY AND TERRELL,
Proctors for Libellants.

Exhibit B, referred to in the bill of exceptions.

United States circuit court, northern district of Ohio. In admiralty.

W. G. & H. J. WINSLOW	}	Affidavit on motion to dismiss appeal.
<i>vs.</i>		
SCHOONER S. S. OSBORNE.		

458 NORTHERN DISTRICT OF OHIO, ss:

Charles H. Bill, being duly sworn, says:

That he is, and for several years last past has been, deputy clerk of the district court of the United States for the northern district of Ohio.

That in the above-entitled cause, when in the district court, no appeal in writing was filed within twenty days from the date of the final decree therein in said district court, viz, December 26th, 1877, nor has any appeal in writing ever, up to this date, been filed in said district court, by Bliss O. Wilcox, claimant and appellant, or by any other person whomsoever.

That on the 27th day of February, 1878, and not before, as appears by the files of this case in this court, an appeal in writing was filed in this court in this case, which is the only appeal in writing, or paper purporting to be such, ever filed in this cause, in either the district or circuit court for this district, by Bliss O. Wilcox, appellant, or by any other person whomsoever.

CHAS. H. BILL.

Sworn to and subscribed before me this 11th day of June, A. D. 1878.

GEO. WYMAN,

Com'r Circuit Court, N. D. O.

459

Exhibit C, referred to in the bill of exceptions.

In the circuit court of the United States for the northern district of Ohio.

W. G. AND H. J. WINSLOW, LIBELLANTS,	} Appeal in admiralty.
<i>vs.</i>	
SCH'R S. S. OSBORNE, &C.	} Affidavit.

Charles M. Vorce, being duly sworn, on his oath says that he is a member of the firm of Prentiss and Vorce, proctors for appellant in this cause.

That on Monday March 11th, 1878, at about 10 o'clock a. m., H. L. Terrell, esq., proctor for libellants, came into the office of Prentiss and Vorce, No. 5 Rouse Block, Cleveland, when this affiant and Loren Prentiss and Wm. H. Condon were then present. That said Prentiss then asked said Terrell whether he would prefer to have the new evidence to be offered by the appellant on the trial of this cause, taken in open court on the trial, or before a commissioner and reduced to writing, and whether said Terrell would attend on the afternoon of the same day before Earl Bill, as commissioner, and take such new evidence without other or further notice, to which said Terrell answered that
 460 it would be preferable to have the testimony taken before trial and reduced to writing, and that he would attend to the taking it that same day, in the afternoon, at 2 o'clock p. m.

And further he saith not.

CHARLES M. VORCE.

Subscribed in my presence, and sworn to before me, by the said Charles M. Vorce, this 15th day of March, A. D. 1878.

GEO. WYMAN,

Com'r Circuit Court, N. D. O.

Exhibit D, referred to in the bill of exceptions.

Circuit court of the U. S., northern district of Ohio, ss.

WM. G. WINSLOW ET AL.	} Appeal in admiralty.
<i>vs.</i>	
SCHOONER S. S. OSBORNE.	

Wm. H. Condon, being first duly sworn, on oath states that about

ten (10) a. m. on Monday, March 11th, 1878, at the office of Messrs. Prentiss and Vorce, he heard Mr. Prentiss say to H. L. Terrell, esq., that he, Prentiss, wanted to take some testimony on behalf of the Osborne, and ask said Terrell if he would consent to have the witness examined on the stand during the trial, or would he attend to their examination at two o'clock that day, before the clerk of said court, or before a U. S. commissioner, and Mr. Terrell said he would attend at two o'clock to taking of the testimony, without formal notice.

Affiant further says that said Terrell, during the afternoon of said day, did attend the examination of five witnesses who testified on behalf of the appellants, and then introduced Clifton B. Beach and examined him as a witness on behalf of the appellees herein, and then said Terrell was sworn and examined as a witness on behalf of the appellees.

Affiant further says that he was present when said Terrell stated to the court, on Tuesday, March 12th, 1878, on the hearing of the motion to dismiss the appeal, that he had agreed to take testimony at 2 o'clock on the day before, and that it was not until after he had so agreed that he filed the motion to dismiss the appeal, a few minutes before eleven on Monday, March 11th, 1878.

Affiant further states that no evidence was introduced or admissions made on the hearing of said motion in support of the same.

WM. H. CONDON.

Subscribed and sworn to before me this day of March, 1878.

GEO. WYMAN,

Com'r Circuit Court N. D. O.

462

Exhibit E, referred to in the bill of exceptions.

The circuit court of the United States for the northern district of Ohio.

WM. G. WINSLOW, H. J. WINSLOW, }

vs.

SCH'R S. S. OSBORN.

} Appeal in admiralty.

And now comes Lorin Prentiss and makes oath and says that he is one of the proctors for the appellant, and that immediately upon the giving of the bond for the appeal of this case to this court he informed H. L. Terrell, esq., one of the proctors for the libellant, that said bond had been so given, and that the appellant would be ready for trial at this term of this court, and requested said Terrell to consent to the sending up of the depositions and written evidence instead of copying the same, and thereby save the appellant the large expense of paying for making such copy; that said Terrell refused so to do, and the clerk of the court thereupon commenced immediately to make up the record, covering some four hundred pages, and costing about \$125.00. That the same was completed and filed February 26th, at which time said Terrell was present and knew that the same was completed and filed, and desired the same for examination preparatory to the trial of this case in this court. That it was then agreed between the said Terrell and affiant, as proctors, that the case should be tried at this term, while the circuit judge should be here.

That affiant, about that time, as well as previous thereto, informed said Terrell that the appellant would introduce new proofs in this case.

That the appellant increased the expenses of procuring the attendance

of Wm. H. Condon, esq., of Chicago, to aid in the trial of the case; and that said Terrell well knew that said appellant was incurring all the expense and trouble necessary to get ready for trial.

That on March 4th, when the case was called by the circuit court for trial, the case was marked for trial; and that it was agreed between affiant and said Terrell that the case should be taken up and tried on Monday or Tuesday, March 11th or 12th, unless reached and required by the court to be tried earlier. That the appellant accordingly procured the attendance of the witnesses in his behalf, and also of said Condon, on Monday, March 11th, and was then ready for trial, and had incurred much expense and trouble ~~is~~ so getting ready.

That on Monday, March 11th, about 10 a. m., this affiant saw said Terrell, and proposed to him to take the new testimony that day before a commissioner, and to which said Terrell agreed, and 2 o'clock p. m. was fixed upon as the time for taking of the same. That the same was

464 taken in pursuance of such agreement, and duly filed in court on Tuesday morning following, the evidence so taken being on the part of the appellant, and some also on the part of the libellant. That no claim has ever been made on the part of the proctors for the libellant, so far as this affiant knows, that they have in any respect been misled or prejudiced.

That no evidence was introduced or admissions made in support of said motion of dismissal; and that said Terrell admitted in open court on the hearing of said motion of dismissal, the facts above set forth as to the allowance of the appeal, the giving of the bond for appeal, the making up of the record, including the copying of the testimony, and the filing of the record in this court, the preparation by both parties for the trial of this cause at this term of this court on the days named, the agreement on his part to take testimony in the same, and the taking of such testimony as above set forth.

L. PRENTISS.

Subscribed and sworn to before me, by the said Lorin Prentiss, this 15th day of March, 1878.

GEO. WYMAN,
Com'r Circuit Court N. D. O.

465 *Exhibit F, referred to in the bill of exceptions.*

U. S. circuit court, northern district of Ohio.

W. G. AND H. J. WINSLOW }
vs. } Appeal in admiralty. Affidavit.
SCHOONER S. S. OSBORNE. }

NORTHERN DISTRICT OF OHIO, ss :

H. L. TERRELL, being duly sworn, says:

1. That as to the statement contained in the affidavit of Lorin Prentiss herein, the following are the facts: That casually, in conversation with said Prentiss, affiant expressed not only a willingness but also a desire to try said case at the former term while the circuit judge was here, and said that he would be ready, and this was before said circuit judge arrived in Cleveland and opened court; that affiant also consented at about the same time that said Prentiss might have said cause set for a particular day, subject to the order of court, in order to

accommodate foreign counsel; but that this affiant, in terms or by implication, agreed to waive any rights or consent to any defects in the appeal, or did anything more than in a casual conversation, outside of court, express a desire on his part to try said cause before the circuit court when it next sat, and a willingness to accomodate counsel
 466 from abroad as to a day of trial, is wholly and unqualifiedly false. The defect in the appeal was at that time unknown to and unthought of by either party, and an intention to waive such defect was, of course, impossible, and the attempt to exalt ordinary conversation between counsel about a case into a solemn compact, whereby rights were acquired or lost, is not in accordance with the facts.

2. As to the agreeing to take depositions on the morning case was set for trial, it hath this extent and no more: affiant was called upon by proctors for respondent to waive twenty-four hours' notice for the taking of depositions, and in reply to such request agreed to accept verbal notice and waive the twenty-four hours. Affiant did not agree to take depositions, since he had none at that time to take, and did not agree to respondent's taking, since he objected thereto, as the depositions show, and that affiant agreed to do anything except waive the 24 hours' notice for the accom'dation of opposite counsel, is unqualifiedly false.

3. As to appearing at taking of depositions, &c., it was after motion to dismiss was filed and after the court had been requested to dispose of said motion before further proceedings in the case, and it was a suggestion of the court that the testimony might be taken, and then dispose of motion and case if necessary.

H. L. TERRELL.

467 Sworn to and subscribed before me this 12th day of September,
 A. D. 1878.

E. W. PAGE,
 U. S. Com'r, N. D. O.

Exhibit H, referred to in bill of exceptions.

In the circuit court of the United States for the northern district of Ohio.

WM. G. WINSLOW AND H. J. WINSLOW,
 libellants,

vs.

SCHOONER S. S. OSBOEN, BLISS O. WILCOX, claimant.

} Appeal in admiralty. Motion to vacate order of dismissal.

Now comes the said Bliss O. Wilcox, appellant, by Prentiss and Varce, his proctors, and moves the court here to vacate and set aside the order and judgment dismissing the appeal in this cause, and to re-instate this cause upon the docket for trial in this court, and for cause for granting this motion the said appellant avers and shows to the court as follows, to wit:

I. That from the time of the giving of the appeal-bond in this cause, on the 12th day of January, 1878, the libellants and their proctors have well known that the said bond was so given, and that the transcript of the record was being prepared herein to be filed in this court, in
 468 pursuance of the appeal of this cause to this court, and that the said record was duly filed in this court on the 26th day of February, A. D. 1878.

That they have also well known during the time above named that the appellant intended to make new and additional proofs in this cause in this court on such appeal.

That during all the time above named it has been understood and agreed between the proctors for the libellants and the proctors for the appellant that the cause should be tried in this court at the present term thereof, and in pursuance of such understanding it was agreed between the proctors for libellants and proctors for appellant, on Monday, March 4th, when this case was called for trial, that the same should be tried on Monday, March 11th, or the following day.

That in pursuance of such understanding and agreement the proctors for the libellants agreed with the proctors for the appellant, about 10 o'clock a. m. of Monday, March 11th, to attend to the taking of new testimony in this case at 2 o'clock p. m. of that day, and did accordingly attend to the taking of the same on behalf of the appellant, and also introduced new evidence in behalf of said libellants before the commissioner before whom said testimony was taken.

That neither said libellants or their proctors have been in any respect misled or prejudiced.

That in accordance with said understanding the appellant has gone to great expense in preparing for the trial of this cause, and was then ready for trial.

II. That this cause was duly appealed to this court and bond duly given therein on the 12th day of January, 1878, and the record therein duly filed in this court on the 26th day of February, 1878, and that no evidence was introduced or admissions made in support of the motion filed by the libellants for the dismissal of the appeal in this case, and that the allegations of the same that no appeal was filed or perfected in said district court are untrue.

III. That the court erred in the granting of said motion to dismiss, and in dismissing the appeal in this case.

PRENTISS & VARCE,

Proctors for Appellants.

Exhibit I, referred to in bill of exceptions.

WM. G. WINSLOW ET AL.

vs.

SCHOONER S. S. OSBOEN ET AL.

} Appeal in admiralty.

This cause came on to be heard upon the motion of Bliss O. Wilcox, claimant of said schooner S. S. Osborn, and appellant, to set aside and vacate the order of this court dismissing his said appeal made and entered on the 12th instant, and the affidavits in support of said motion, and was argued by the proctors of the respective parties.

On consideration whereof the court, the honorable circuit judge presiding, doth find that notwithstanding said appeal was not perfected in accordance with the rule of said district court, yet the court being of the opinion that the irregularity in said appeal had been waived by the appellee, doth order that said order of dismissal be set aside and vacated, and that this cause be reinstated on the docket of this court.

And thereupon came said appellees, by Mr. Terrill, their proctor, and except to the said ruling and order of the court; and it is further ordered that both parties be allowed to take new testimony to be used on the trial of this cause, and this cause is continued to the next term of this court.

JNO. BAXTER.

Exhibit J, referred to in bill of exceptions.

In the circuit court of the United States within and for the northern district of Ohio. In admiralty.

BLISS O. WILCOX, APPELLANT,	} Appeal.
<i>vs.</i>	
WM. G. WINSLOW AND H. J. WINSLOW, AP- pellees.	

The said Bliss O. Wilcox represents to the court here that, 471 on the 26th day of December, A. D. 1876, in a cause in admiralty then pending in the district court of the United States for said district, wherein the said Wm. G. Winslow and Hezekiah J. Winslow were libellants, and the schooner S. S. Osborne, her tackle, &c., and the appellant as claimant thereof, were respondents, and appellant as such claimant was cross-libellant, and the schooner American Union, her tackle, &c., and said appellees, as claimants thereof, were respondents to said cross-libel.

Said district court rendered a decree in favor of said appellees as such libellants and against the appellant as such claimant and J. Emery Bailey and Thomas Cartright as bail for \$4,030.00 damages and \$517.48 costs, and dismissing said cross-libel as by the transcript of the record of said cause and decree filed in this cause doth appear.

And said Bliss O. Wilcox hereby appeals from said decree and prays that upon the hearing of said appeal upon the testimony offered in said district court and upon new proofs to be offered by appellant as follows:

As to the course and locality of the vessels American Union and S. S. Osborn, at and before the collision in the libel complained of and thereafter.

As to the direction of the wind at and before the time of said collision at and near the locality thereof.

As to the sail carried by each of said vessels and as to the 472 manner of said collision and the injuries caused thereby.

As the visability of the American Union's lights before and at the collision, and as to the improper placing and carrying of said lights by said vessel.

As to the sufficiency and competency of the lookout on said American Union before and at the collision.

As to the credibility of libellant's witnesses and to contradict the testimony of the same.

To impeach Robert F. Parsons, a witness produced and used by the libellants.

That said decree may be vacated and reversed, and that appellant may recover of said appellee's his damages and costs, as in his cross-libel in said cause in said district court he prayed.

PRENTISS AND VARCE,
Proctors for Appellants,
BLISS O. WILCOX, *Appellant,*
By PRENTISS AND VARCE,

Filed Sept. 19th, 1878.

And afterwards at the April term, A. D. 1878, of said court, to wit, on Tuesday, September 24th, the following decree was entered:

473

Decree and reference.

WM. G. WINSLOW ET AL.

*vs.*SCH'R S. S. OSBORN, BLISS O. WILCOX, CLAIM-
ant and cross-libellant.

} Appeal in admiralty.

This day came the parties, by their proctors, and the court, having duly considered the testimony and arguments of counsel thereupon, and being now fully advised in the premises, doth find and pronounce that the collision in said libel, and in said answer and cross-libel mentioned, was caused by the mutual fault of the persons who had the charge and management of the schooners American Union and S. S. Osborn, respectively, and doth order, adjudge, and decree that the damages arising and accruing to the said vessels, together with the costs of this suit, be paid or accounted for by each of said vessels, or the owners thereof, in equal proportion.

And the cause is hereby reported to A. J. Ricks, esq., clerk of this court, as a special commissioner to ascertain from the testimony now on file in the cause, and from such other testimony as may be adduced by the parties before him, and so report to the court as soon as conveniently may be, the amount of damages caused to each of the vessels aforesaid by reason of said collision, and to make division thereof according to the provisions and terms of this decree.

474

Order of continuance.

And afterwards, at the October term, A. D. 1878, to wit, on January 3rd, 1879, an order was entered in this cause of continuance to the next term of said court.

475

Master's report.

In the circuit court of the United States, northern district of Ohio, eastern division.

WILLIAM G. WINSLOW ET AL.

vs.

SCH'R S. S. OSBORN ET AL.

} Appeal in admiralty. Master com-
missioner's report.

The master, to whom it was referred "to ascertain from the testimony now on file in the cause, and from such other testimony as may be adduced by the parties before him, and so report to the court as soon as conveniently may be the amount of the damages caused by each of the vessels aforesaid by reason of the collision, and to make division thereof between each of said vessels, or the owners thereof, in equal proportions," begs leave to submit the following as his report:

Testimony of witnesses has been taken by the master, in the taking of which he has been attended by the proctors of the respective parties, which testimony is filed in court with this report. The claims of the parties hereto have been fully presented by their counsels, and, after due consideration, the master reports his findings as follows:

First. As to the damage sustained by the libellants by reason of said collision—

The master finds that said damages have been correctly reported by the master in the district court, which report is in evidence before him on this hearing.

476 In said report the repairs to the American Union, made necessary by the collision, were by agreement of parties fixed at the sum of fifteen hundred dollars. The amount due the libellants as demurrage for the detention of said vessel during the twenty-two days she was undergoing repairs, was by agreement fixed at the sum of sixteen hundred dollars. The claimant alleges that said sums were agreed upon, not because they were conceded to be correct, but simply to afford the basis for a decree in the district court; but as no satisfactory testimony has been offered upon which the master can base a finding which, in his judgment, would approximate any nearer to the actual damages sustained, he fixes, and so reports, the damages sustained by the said American Union by reason of said collision to be the sum of three thousand one hundred dollars (\$3,100).

Damages due the libellant, \$3,100.00.

Second. As to the damages sustained by the claimant—

The master finds from the testimony of Bliss O. Wilcox, the owner and claimant of the Osborne, and from the several exhibits produced and proved by him, that he expended for repairs to the schooner S. S. Osborne, made necessary by said collision, the sum of seven thousand two hundred and eighteen dollars and fourteen cents (\$7,218.14). The master has included in said sum an allowance to the owner of said vessel for thirty-six days' labor and suspension of said repairs at five dollars per day, and had deducted from the towage bills claimed by
477 said owner the sum of \$175, which sum he would have expended for towage in making his usual trips, and which cannot be claimed as an expenditure made necessary because of said collision. The aggregate sum fixed as above stated represents the actual repairs made necessary by said collision.

The master has carefully considered the authorities cited by the claimant in support of his claim, that the measure of damages sustained by the schooner Osborne is the value of the use of that vessel in open market during the period of forty-five days she was detained for repairs made necessary by reason of the said collision.

Both said vessels, it is admitted, were under charter for the season of 1872 to carry iron-ore for the Cleveland Iron Mining Co. from Escanaba, Michigan, to Cleveland, Ohio, or Erie, Pa., at the rate of two dollars per gross ton when delivered at Cleveland and two and $\frac{2}{100}$ dollars per gross ton when delivered at Erie. Under said contract the Osborne had made six trips, five of which had been made from Escanaba to Erie, and at the time of the collision she was making her seventh trip and was bound for Erie.

The contract for the season as referred to was made in November, 1871, and based upon the rates prevailing during that season, after the opening of navigation in 1872; the going rates of freight advanced rapidly, and all kinds of vessels were in active demand.

The testimony shows that at one period of the season the rates of freight were as much as five dollars per ton to vessels of the same class as the Osborne. It is insisted by the claimant that the value of the use of the vessel on the basis of such going rates of freight
478 is the true measure of damages to be allowed for the period she was detained for repairs, and various decisions have been referred to as establishing the principles upon which this claim is based.

But the master has been unable to find authority for any such allowance in the cases cited.

All that the claimant can equitably ask is that he be restored to the condition he was in as owner of the vessel at the time of the injury. A

full allowance for all necessary repairs and demurrage for the full period of the detention by reason of the collision, on the basis of the contract made for the season, is a full indemnity for the loss sustained, an allowance for demurrage, which will represent the full earnings the claimant could have made under the charter had the collision not occurred, is all that the master can find authority for reporting.

Upon this basis, as to the measure of damages, the master finds that the said claimant's net earnings per day, under said contract, amounted to the sum of \$68.50, viz :

Freight on 1,100 tons of ore from Escanaba to Erie, @ \$2.20 per ton	\$2,420 00
Expenses of trip to be deducted	1,256 00

Net earning each trip..... \$1,164 00

Average length of trip from Escanaba to Erie, 17 days; making value of use of vessel per day \$68.50.

Total demurrage, 45 days..... \$3,082 50

479 The total damages sustained by the Osborn, by reason of said collision, the master finds as follows :

Repairs made on Osborne	\$7,218 14
Demurrage during detention.....	3,082 50

Total damages sustained by Osborne \$10,300 64

Should the court be of the opinion that the claimant is entitled to the value of the use of the vessel at the going rates of freight during the period of the Osborne's said detention, the master finds, by request of claimant's proctors, the damages on said basis as follows :

Freight on 1,100 tons ore from Escanaba to Erie, @ \$4 per ton	\$4,520 00
Expenses of trip, to be deducted	1,256 00

Net earnings each trip..... \$3,264 00

Average length of trip from Escanaba to Erie, 17 days; making value of use of vessel per day \$192.

Total demurrage 45 days, @ \$192 per day..... \$8,640 00

The total damages sustained by the Osborne by reason of said detention the master finds as follows :

Repairs made on the Osborne.....	\$7,218 14
Demurrage during detention, as above.....	8,640 00

Total damages sustained by Osborn, on basis of going rates of freight during detention \$15,858 14

If the demurrage allowed the Osborne should be upon the basis of the going rates of freight during the time of her detention, the allowance upon the same principle should be made the American Union, to wit :

Freight on 900 tons from Escanaba to Erie, @ \$4 per ton ..	\$3,600 00
Gross expenses of trip	1,100 00

480 Net earnings each trip..... \$2,500 00

pellant, and excepts to the report of A. J. Ricks, special master in this cause for the following reasons, and in the following respects, to wit :

1. That said master erred in finding and reporting that the libellants are entitled, as damages for the delay of the schooner American Union, to the sum of \$1,600.00 upon the basis of her net earnings under her charter made in the fall of the year 1871, when the sum allowed upon such basis should be the sum of \$1,138.72 only.

2. That said master erred in finding and reporting that said claimant is entitled as damages for the delay of the schooner Osborne to the sum of \$3,082.50 only, instead of the sum of \$8,640.00.

3. That said master erred in finding and reporting that said claimant is not entitled to recover the value of the use of the schooner Osborne during the time she was delayed in making repairs at the current 483 market rates of freight, less ordinary expenses.

4. That said master erred in admitting in evidence the charters made by the owners of the respective vessels in the fall of 1871, to govern and control in fixing the amount of the damages for the delay of the respective vessels while making repairs, and in finding and reporting that said charters do in law control in fixing the damages for such delay.

5. That said master erred in finding and reporting in legal effect that said claimant and appellant was only entitled to recover the net value of such charter, instead of the full net value of the use of said schooner Osborne during said delay.

6. That said master erred in finding and reporting that the total damages due to the libellants' amounts to the sum of \$3,100.00.

7. That said master erred in finding and reporting that the total damages due to the appellant as claimant of the schooner S. S. Osborn, amounted to the sum of \$1,030.64 only.

8. That said master erred in finding and reporting that the appellant as claimant of the schooner Osborne is entitled to recover from the libellants upon division of damages the sum of \$4,965.72 only, instead of the sum of \$7,656.16.

PRENTISS AND VORCE,
Proctors for Appellant.

Filed March 10th, 1879.

484

Testimony before master.

In the U. S. circuit court for the northern district of Ohio.

WM. G. WINSLOW ET AL.,

vs.

BLISS O. WILCOX, CLAIMANT AND CROSS-
libellant.

Hearing in damages before A. J. Ricks, special master, September 26th and 27th, 1878.

Testimony on behalf of respondents.

Present, W. H. Condon for respondents.

" H. L. Terrell for libellant.

BLISS O. WILCOX, being first duly sworn, was examined in chief by Mr. CONDON and testified as follows :

Q. What is your name, age, residence, and occupation ?

REC. 243—15

A. I am about 66; reside in Painesville, Lake County, Ohio.

Q. You were the owner of the schooner S. S. Osborn at the time of this collision?

A. Yes, sir; sole owner.

Q. Did you have the damages sustained by the Osborn in that collision repaired in part?

A. Yes, sir.

Q. Where?

A. At Cleveland.

Q. What amount, if any, did you pay out in repairing that vessel, or for materials to Quayle, Martin & Co.?

A. \$290.

485 Q. Have you the bill for the same; and, if yea, attach it to your deposition as Exhibit A.

A. Here is the bill, which is marked Exhibit A.

Q. What work did Mr. Wm. H. Radcliffe do in repairing said damage?

A. The bills that I have paid set forth.

Q. Are these the two bills, (showing papers to witness)?

A. Yes, sir.

Q. Are they correct?

A. Yes, sir. The bill amounts to \$3,228.65, Exhibit B; Exhibit C amounts to \$29.

Q. What amount of tow-bills did you pay in Cleveland, rendered necessary by reason of this collision?

A. These amounts in Exhibit D, \$10; and E, \$20.

Q. What did you pay the tug Kate Williams for towing?

A. \$250. Here is the bill, Exhibit F.

Q. What amount did you pay the Northern Transportation Co. for towing?

A. \$150. Here is the bill, Exhibit G.

Q. What amount was paid the propeller City of Detroit for towing?

A. Towing from Mackinaw to Port Huron, \$500. Here is the bill, Exhibit H.

Q. What amount did you pay A. Lacour, and what was it for?

A. Blacksmithing and repairs, \$166.14. Here is the bill, Exhibit J.

Q. What amount did you pay J. Grover and Sons?

A. \$103, for small boat.

Q. Rendered necessary by the collision?

A. I suppose so; yes, sir. Here is the bill, Exhibit K.

Q. What amount did you pay the Globe Iron Works on account of this collision?

A. \$91.61. Here is the bill, Exhibit L.

486 Q. What amount did you pay Upson and Walton on account of this collision?

A. \$201.73 and \$85.88; Exhibits M and N.

Q. What amount did you pay S. B. Conklin?

A. \$121.44; Exhibit O.

Q. What amount did you pay John O'Neil on account of this collision?

A. \$264.94; Exhibit P.

Q. What amount did you pay R. T. Lyon and Son?

A. I have here a bill for five barrels of salt, \$9.50; Exhibit Q.

Q. How much money did you expend for salt besides that?

A. I bought two loads, I know. I think one was 9 barrels and the other was 5 barrels.

Q. At the same rate?

A. Yes, sir.

Q. Have you any bills of that?

A. I have not.

Q. Was that used in repairing the damage of the collision?

A. Yes, sir.

Q. What amount did you pay Herbert, Hawley and Co. on account of this collision?

A. Mr. Radcliffe paid that bill. I gave him money, \$40, to go and settle the bill, and he brought me back the balance; the bill is \$27.40.

Q. What amount did you pay for refitting and fitting out the vessel, and to whom?

A. To Mr. Smith; \$410.

Q. This is the bill of it?

A. Yes, sir.

Q. Was that rendered necessary by reason of the collision?

A. Yes, sir; it is Exhibit R.

487 Q. What amount on account of this collision did you pay John Bates?

A. I didn't pay that. Captain Seamans paid that.

Q. How much?

A. \$5.

Q. What amount did you pay A. T. Van Tassel?

A. \$7.45.

Q. Was that on account of the collision?

A. Yes, sir.

Q. Here is a paper containing four receipts of \$30 apiece from Smith, O'Niel, McDonald and Lieb.

A. Those are from the time she came in, the 16th of August.

Q. Until what?

A. Until they commenced on the 31st of August—commenced refitting her.

Q. Those wages for members of the crew?

A. No; they were hired. The captain let the job to Smith.

Q. What were they doing?

A. They were working for the vessel; that is, working in the shipyards, 'oust abouts, and everything else.

Q. Here is a receipt from John Fell, \$32.88. What is that for?

A. That was for the same as the others.

Q. Work rendered necessary by the collision?

A. Yes, sir. I got run a little short of money, and I told the captain to pay him as soon as he got to Milwaukee, and he took this receipt in Milwaukee.

Q. Here is a receipt signed, for \$60, by Sylvester Smith.

A. That was the steward.

Q. 24 days from the time of this collision?

A. 24 days from the time she entered here I settled up. I suppose up to that time, and then he quit the 9th of September.

488 Q. Was he cooking for these men that were at work?

A. Yes, sir.

Q. And the amounts paid them were in addition to their board, and this man did the cooking?

A. Yes, sir; that man did the cooking.

Q. Did you repair all the damage to the hull rendered necessary by this collision?

A. No, sir.

Q. How much more was there left unrepaired?

A. We did not make the foreyard here, for we could not get a stick in the place to make it that was long enough and large enough, nor we didn't repair the cut-water nor the figure-head; it was gilded iron, I think.

Q. About how much would it cost to do that?

A. That is an estimate that I got Mr. Radcliffe to make (producing the paper).

Q. Is that correct, in your opinion?

A. In my opinion it cannot be far out of the way.

Q. Was the master of the vessel under pay while it was being repaired here?

A. He was.

Q. At what rate?

A. At the rate of \$1,200 the season.

Q. How much a day?

A. That would be \$5 a day.

Q. \$210 you have figured it out here.

A. That is \$5 for a day.

Q. Were his services necessary at that time?

A. I think they were; there were no lasing hands on board.

Q. Was he at work there?

A. Yes, sir; they were all kept at work.

489 Q. What were the mate's wages during the time he worked?

A. The books will show.

Q. You have it figured out here?

A. It says August 28th, \$100 a month.

Q. 42 days she was detained, you have it figured here?

A. \$139.96.

Q. Do you know how much the second mate was getting?

A. I only know by the books here; it was \$100 a month.

Q. The 2nd mate was getting as much as the first mate?

A. It appears by the books he was.

Q. What was the steward getting?

A. That represents \$100 a month.

Q. And the cook?

A. Well, that is the cook, the steward.

Q. How much was the board of the men that were kept employed there worth?

A. Six shillings a day; it is worth more, but that is what I charged.

Q. It is figured up \$315?

A. Yes, sir.

Q. Were you at work there?

A. I was.

Q. What doing?

A. I was taking charge of pretty much everything.

Q. What charge did you make for your services?

A. I charged \$10 a day.

Q. It amounts to how much; 36 days here, marked \$360?

A. I suppose that is it.

Q. I notice under the head of disbursements, in the vessel's book, under date of August 15th, blocks, repairing blocks \$72; do you
490 know whether that was work rendered necessary by the collision?

A. I could not tell you. I could not pretend to say.

Q. Did she get any blocks before this collision?

A. Not that I know of.

Q. What are these items here in this book ?

A. General disbursements.

Q. On account of what ?

A. Well, expenses of the vessel ; what is called general, I suppose, running expenses.

Q. You don't know where those blocks were bought ?

A. I do not.

Q. Do you know anything about having a force-pump ?

A. I do.

Q. Where was that got ?

A. That was got—it was one that was put in when she was built, and it was broken in the collision ; I don't know how much it cost to repair it. We undertook to repair it by using amberline and marline and such like, but could not do anything with it, and they had to give it up, and we was in too big a hurry, too.

Q. Did you get another one ?

A. I didn't get another one.

Q. What was the value of that at the time of the collision ?

A. My impression is the pump and fixtures cost \$75.

Q. Do you know what the condition was at the time of its collision ?

A. It was always in good order.

Q. The MASTER. That was a pump attached to the vessel before the accident ?

A. Yes, sir.

491 Q. Mr. TERRELL. How old was it ?

A. I don't know, it may have been five years old ; it was a pump used for washing decks and such like.

Q. Mr. CONDON. How long do they usually last ?

A. Well, I could not tell you that ; I know it was in good order.

Q. Do you know whether they last more than 5 years ?

A. I know it was in good order before the collision, because I was aboard the vessel, generally speaking, every trip ; when she went to this place I was aboard the vessel.

Q. Here is a bill, August 29th, \$20.22, calking and fishing gaff.

A. I don't know anything about it ; all I know is what is on the book here.

J. W. WALTON, being first duly sworn, was examined in chief by Mr. CONDON, and testified as follows :

Q. Look at Exhibits M and N of Mr. Wilcox's deposition, and state what you know in regard to the items mentioned therein, and the prices charged for them ; who they were furnished by, and for what purpose, so far as you know.

A. Those bills were made out by our book-keeper, with the exception of the last item on this bill, which was made out by my partner. (Exhibit M.) They both came from our office ; the prices are right, and the goods were furnished to the schooner Osborn at the time.

Q. While she was being repaired ?

A. While she was being repaired, subsequent to the collision with the American Union.

492 Q. The prices were reasonable and proper ?

A. Yes, sir ; the prices were the usual prices at that time ; in fact, rather under the usual prices than over.

Q. Were you acquainted at that time with the value of force-pumps and fixtures, such a one as would be used on the Osborne ?

A. Yes, sir ; I am.

Q. What would be the value of one?

A. The Osborn would require a large size force-pump—the only one that would be fit to put on a vessel of that size. The cost at that time of them was not less than \$45. That is for the bare pump without any fixtures; they require more or less hose; I am not so much able to state what that was worth at that time from recollection simply; couplings and pipes and the pipes necessary to connect them with the water below, going down through the vessel, that is a matter that would be different in different schooners.

Q. Give the average cost of a pump and fixtures for a vessel of that size.

A. I have been considering that since sitting here. Mr. Radcliffe spoke to me about it; I should think a low estimate, perhaps a fair estimate, would be \$75, and from that upwards.

Q. How long do they usually last with proper care?

A. Oh, they will last with some small repairs, such as renewing the hose, which wears out rapidly on pumps—I don't know why they would not last the life-time of a vessel.

Q. Twenty years?

493 A. I should think they would, 15 or 20 years. Of course the boxes have to be packed occasionally, and the hose have to be renewed.

Q. A trifling expense?

A. Hose renewing is the least part of it.

WILLIAM H. RADCLIFFE, being first duly sworn, was examined in chief by Mr. CONDON, and testified as follows:

Q. Look at Exhibit B of Mr. Wilcox's deposition, and state what it contains—what work was done by you.

A. This bill pertains to work that was done by me on the schooner S. S. Osborn, commencing August 16th to Sept. 26th, when I got through. This bill was finished on the 21st.

Q. What will you say in regard to the prices charged for each item there?

A. They were the market prices at that time, and I think there is nothing over the market price at that time. I think I gave Mr. Wilcox a little under the market price in some items that I had on hand.

Q. Look at Exhibit C, and state about that also.

A. That was the last piece of work that I done for the vessel; it was a continuation of that. I could not finish the work right along until I got it out of the way, and there was four days' work in finishing around the windlass on the dock after I had made out this first bill.

Q. Then it was under your charge?

494 A. It was under my charge, and a part of the same repairs in consequence of the collision.

Q. You were repairing her from the 16th day of August on until the 26th of September. Was she repaired as rapidly as the facilities here would permit?

A. I think she was. I could not have used any more men without its being a damage both to myself and the owner of the vessel. They would have been in each other's way to have employed any more. The work was confined to a small part of the vessel, so I could not have employed any more men but what it would have been a disadvantage to all the parties concerned.

Q. So far as you could learn by what was said by Mr. Wilcox, and

his actions, was he or was he not anxious to have her ready for sea as soon as possible?

A. He was very anxious to have her ready for sea. He was crowding me in all shapes, and assisted me a great deal.

Q. Is there any item or charge contained in these two exhibits, B and C, that was for any other purpose than that rendered necessary by reason of this collision?

A. There is not. There is no charge there but what is actually necessary.

Q. What do you know about Exhibit R, the Herbert, Hawley and Co. charge?

A. That was for a stick containing 935 feet of timber that I purchased for a jib-boom. I did not have the timber myself, and went to the parties now known as the Cleveland Saw-mill Co.

Q. Was it used by you in repairing?

495 A. It was used by me for a jib-boom for this vessel. Mr. Wilcox furnished that money. I found I could buy it \$5 a thousand cheaper than he could, and I told him he had better give me the money.

Q. The charge is reasonable.

A. It is reasonable.

Q. Did you repair all the items rendered necessary by reason of the collision to the Osborn?

A. I did not, sir. For I could not find a stick of timber in town to make a fore-yard for her. I found one we made a mast of, but it was too short, I had to splice it. I got it from Quayle and Martin (the bill is here presented); but for the fore-yard I could not find a stick, and telegraphed to Port Huron to know what they would furnish a stick for, a cut-water, and head, as we term it, for the vessel. They were not put on. They were not really any detriment to the vessel going about business, any more than she was not finished, was not complete, looked unfinished, and it was not done. Being in a hurry he thought he had better leave it until some other time. He asked me to make an estimate of what it would cost, and I made an estimate at that time; a reasonable one. This appears to be in my handwriting: "Estimated cost of heading, with gilding, &c., \$150. For the fore-yard, \$75." \$75 I know was the cost of the yard afterwards, because they telegraphed me from Port Huron they would furnish him one ready-made when he came there at that price. \$150 I consider a reasonable figure. I would have done the work for that, and I don't think I
496 could have done the work for less, if I had time. That was my estimate at that time.

Q. It is correct, to the best of your knowledge?

A. To the best of my knowledge.

Q. How long have you been in the business of repairing vessels?

A. I have been in the ship-building and repairing business ever since the year '42.

Q. Look at Exhibit A, and state what you know about it.

A. That is a bill presented by Quayle and Martin for two sticks. We purchased the first one for the mast, for which we paid \$750. It was the best we could do. We ought to have got a stick, if there was one in the market, long enough. We ought to have bought it for that price; but it was the best we could find at that time. It was one he had for a vessel, and he had to send to Pennsylvania for one in the place of it.

Q. That estimate was reasonable?

A. It was a low estimate. \$40 for the bow-sprit stick was reasonable.

Q. Suppose that you had been employed to repair the head and cut-water of this vessel as it should have been done to make it in similar condition to what it was before this damage, and furnish this yard, how quick could you have done that?

A. It could not possibly have been done—the head work could not possibly have been finished without detaining it at least five days, and I think more. It possibly could have been fixed in six days. Not within a shorter time; I am satisfied of that.

Q. You have done that work frequently?

A. I have done that work; don't it repeatedly.

497 Q. Do you know whether that was one of the reasons they did not have it done?

A. That was the very reason he did not have it done; freights were rising, and he was in such a hurry to get the vessel to doing something; he would not wait for it.

Q. (the MASTER): This was done at Huron?

A. The head was not put on yet. They got it made—got it at Huron, but the head was not put on until afterwards. I made a temporary repair the next time she came in here.

Q. (Mr. CONDON): What do you know about the captain and crew of the vessel while you were making these repairs on the schooner?

A. Some of them were helping me in the capacity of laborers. They went to Quayle and Martin's ship-yard, and got these spars out, different times, to the saw-mill; kept them generally pretty steadily employed until they went to rigging; we had been to work, I guess, two weeks or more before they commenced rigging, and then I had one or two of them helping me, probably.

Q. Were any of the crew around there employed during the time you were making these repairs?

A. I am pretty certain there were; between Mr. Wilcox and myself, we kept them pretty well employed. As a general thing Mr. Wilcox was with me, assisting me most of the time.

Q. If those seamen had not done the work, who would you have employed?

A. I would have employed mechanics to have done it.

Q. (the MASTER:): Did they work to as good advantage?

498 A. Most sailors are very useful men as assistants around a ship-yard, because they are a class of men that work in ship-yards all winter; men we employ as laborers when building a vessel as general thing.

Q. How did the prices paid these men compare with the prices you paid laborers?

A. Just the prices I would have paid laborers; that happened to be a high-priced time.

JOHN B. COWLE, being first duly sworn, was examined in chief by Mr. CONDON, and testified as follows:

Q. Look at Exhibit L to Mr. Wilcox's deposition, and state what you know about it.

A. That is our book-keeper's handwriting, and I looked over our book for '72 before I came up here, and I find it just the same as this; \$91.61, that is correct; that is our book-keeper's handwriting.

Further hearing of testimony was here adjourned to 10 o'clock Friday, Sept. 27th.

Sept. 27th, 11 o'clock a. m. hearing resumed pursuant to adjournment.

BLISS O. WILCOX, being recalled, was examined in chief by Mr. CONDON, and testified as follows:

Q. When did the Osborn, after being repaired after this collision, leave Cleveland, and where for?

A. She was ready to leave the night of the 26th of September.

Q. What cargo did she take?

A. She took coal and pig-iron.

Q. What did the freight on that cargo amount to?

499 (Objected to.)

A. \$2,235.65.

Q. When did that vessel arrive at Milwaukee?

A. It arrived October 2nd.

Q. How do you know that?

A. I know that from a telegram received from the captain.

Q. What kind of a cargo did she bring from Milwaukee?

A. Cargo of wheat.

Q. Where to?

A. Buffalo.

Q. What did it cost for the charter of the cargo?

A. \$30.

Q. What did it cost to load it, and trimming?

A. Trimming, \$90.

Q. What did it cost for the tow-bills in Milwaukee that trip?

A. \$80.

Q. What did it cost for tow-bills through the rivers on the way down?

A. \$155.

Q. What were the tow-bills for towing that cargo of grain into the port of Buffalo?

A. \$34.

Q. What did the elevating and shovelling of the cargo cost about?

A. \$250.

Q. How much wheat does she usually carry?

A. She will carry 40,000 bushels of wheat, or 1,130 or 20 tons of ore, gross tons.

Q. How much coal?

A. 1,190 tons.

Q. What did it cost to clear, report and telegraph your arrival?

500 A. \$2.

Q. Was that done at Buffalo as well as Milwaukee?

A. Yes, sir.

Q. What were the wages of the men per day on the trip from Cleveland to Milwaukee, and Milwaukee to Buffalo; how many men did she carry?

A. She carried six men.

Q. What were their wages per day?

A. \$3.

Q. What wages did the mates and steward receive per day?

A. The steward and the second mate received \$3.33 a day each.

Q. What were the captain's wages?

A. The captain's wages were \$1,200 for eight months; might say, the season of sailing.

Q. What did that amount to a day?

A. \$5.

Q. What did the board of the men per day cost on an average?

A. Cost all of six shillings a day.

Q. 75 cents each?

A. Yes, sir.

Q. What did it cost for tow-bills in Cleveland in towing the iron-ore and coal here, and transferring it outside?

A. \$72.

Q. Did you sustain any loss on the freight that your vessel was carrying at the time of this collision?

A. Shortage on wheat.

Q. I mean the iron-ore, when she was struck at the time of this collision?

A. Yes, sir; 20 cents a ton.

Q. Why was that?

501 A. Because, on account of the collision, we were damaged, and we could not perform the contract to Erie.

Q. How many tons did you have on that trip?

A. 1,014.

Q. The consignees took it here instead of at Erie?

A. Yes, sir.

Q. And deducted 20 cents a ton from your freight?

A. Yes, sir.

Q. That would be over \$2,000, wouldn't it?

A. Yes, sir.

Q. After deducting from the gross freight that a vessel such as the Osborn would make, all these charges that I have mentioned occurring on her up and down trip, the balance would be what?

A. Net profit.

Q. What rate per bushel did she get on the grain on that down trip?

A. 19 cents.

Q. How have you obtained the figures that you have given in regard to these items of expense, and from where?

A. From the vessel's book.

Q. In whose handwriting are they?

A. They are in the captain's handwriting.

Q. Did you examine them during those trips, or shortly afterwards?

A. Examined them in our settlement when we closed up business in the fall.

Q. Do you know whether they are correct or not?

A. They are settled as correct.

Q. Do you know whether they are correct or not from your experience in running vessels?

A. Yes, sir.

Q. You say they are?

502 A. Yes, sir.

Q. Where is the captain now?

A. He is in Kansas.

Q. Is this a book of original entries from which you derive those facts?

A. Yes, sir.

(Vessel's book of the S. S. Osborn for the season of 1872 was here offered in evidence.)

Q. Upon looking over the exhibits I find one for a small boat to Grover and Son, of \$103, marked in the month of December. Do you know whether that small boat sustained any damage at the time of the collision of your own knowledge?

A. No, sir.

Q. You don't know whether that is a proper charge in this case or not, do you?

A. I do not, sir.

Cross-examination by Mr. TERRELL:

X Q. You were carrying iron ore at the time of this collision?

A. Yes, sir; had been.

Q. How long had you been carrying iron ore?

(Objected to as immaterial.)

A. I carried it up until the time of the collision.

Q. During the whole season?

A. Yes, sir; up to the time we had the collision.

Q. From Escanaba to Erie all the while?

A. Yes, sir.

Q. Who were the consignees in Erie?

A. I will have to refer to the book—The Erie and Pittsburg R. R. Co.

503 Q. Do you know who owned it?

A. I think it was belonging to the Cleveland Rolling Mill Company.

Q. Had you been carrying their ore all the season?

A. It was all one kind.

Q. All one kind of ore?

A. Yes, sir.

Q. Had they been the owners of all the ore you had been carrying that season up to that time?

A. I believe they were.

Q. Was your boat chartered?

A. There was a charter made. I claim they broke the charter.

Q. There was a charter made?

A. Yes, sir.

Q. With whom?

A. Miller and Bates.

Q. They were vessel agents?

A. Yes, sir.

Q. Made both in their own names, and behalf of the Cleveland Rolling Mill Company?

(Objected to as incompetent.)

A. I don't recollect particularly about that.

Q. Where is the charter?

A. That is more than I can tell. I expect some of you lawyers have got it.

Q. You don't mean I have got it?

A. I don't know. I could not say who has got it.

Q. You haven't got it?

A. No, sir; I haven't got it.

Q. Did you have a copy of it?

A. I had a copy.

Q. Where is that?

A. I can't find it.

504 Q. That is lost, is it?

A. That is the one I was speaking of. I suppose the other parties have the other one; probably you know.

Q. No, sir; if I did know I should not ask the question.

Q. Don't you think your charge of \$10 per day is a little high?

- A. It may be. I leave it to the court to say.
- Q. (Mr. CONDON.) While this vessel was being repaired was she, in your opinion, under charter or not?
- (Objected to.)
- A. I did not consider it under charter.
- Q. From your recollection of the charter were the terms of it complied with on the part of the charterers?
- (Objected to.)
- A. No.
- Q. Why?
- A. Because the agreement was I should have half the ore to Erie, and a half to Cleveland.
- Q. Was ore given you to carry to both places?
- A. No, sir.
- Q. Were you ready and willing to carry to both places?
- A. Yes, sir.
- Q. Why didn't they give it to you, if you know?
- A. Because they wanted I should take it to Erie.
- Q. (Mr. TERRELL.) You took it to Erie, didn't you?
- A. All but the load delivered here in a crippled condition.
- Q. You took all of the balance to Erie?
- A. Previous to that.
- Q. You had started to Erie with that at the time of the collision?
- A. We were bound for Erie.
- Q. (Mr. CONDON.) On the pig-iron and coal which the Osborn
505 took from Cleveland about the 27th of September to Milwaukee, were there any charges to the vessel for loading or unloading, or was it free of handling to the vessel?
- A. Free of handling; yes, sir.
- Q. (Mr. TERRELL.) Who was it carried for?
- A. It was shipped from Reddington's block.
- Q. (Mr. CONDON.) You don't know who it was consigned to?
- A. I don't know without reference to the bill of lading—I mean the pig-iron.
- Q. Who shipped the coal?
- A. I could not tell you without the bill of lading.
- Q. Which you haven't got here?
- A. No, sir.
- Q. Did the schooner S. S. Osborn incur any other expenses than these you have named, on those trips?
- A. No, sir; not that I know of.
- Q. When did the S. S. Osborn leave Milwaukee with that 19 cent cargo of grain?
- A. Cleared October 9th from Milwaukee.
- Q. How do you know that?
- A. I know that from the books.
- Q. Did you get any despatch from there?
- A. Got one Oct. 2nd; that is, on the arrival.
- Q. Did you get one on the 9th stating he had started?
- A. I think I got two despatches from him while he was in Milwaukee.
- Q. Did you get one on the 9th notifying you that she started, or was to start that day?
- A. Yes, sir.
- Q. When did you learn and how that she had arrived in Buffalo with that cargo?

506 A. By a despatch.

Q. When?

A. On the 16th of October.

Q. So she was from the 9th to the 16th making the down run?

A. Yes, sir.

Q. About what was her average run from Escanaba to Erie with ore?

A. The average run would be to run down from Escanaba and those places six days.

Q. About how long to run back?

A. About the same time.

Q. In making the round trip from Escanaba and down and unloading and running back would average about how many days altogether?

A. Well, it would not vary far from 16 days; it might go a little over.

Q. When she carried a cargo of grain, how was it about the delay in unloading usually?

A. Well, in carrying grain to Buffalo, I see by the books she cleared the same day she arrived.

Q. That indicated that she had unloaded when?

A. That she had unloaded the same day.

Q. While you were running to Erie that season did you take any up freight—any cargoes?

A. I find on looking at the book I did not take any up-freight up to the time of the collision.

Q. Do you know whether it is usual for sailing vessels to make any better time during the month of Sept. and the latter part of August than in June and July?

A. Yes, sir.

Q. Why?

507 A. Because they have more wind than they have in June and July.

Q. What kind of wind usually prevail in the fall on the lakes?

A. They are westerly and southwesterly winds.

Q. Are those the best for the purpose of sailing?

A. They are for coming down; they are fair all the way going up; from this port up; they are fair until they work under Beaver harbor or Grand Island, and, of course, they bear ahead.

Q. The vessels tow through the rivers always?

A. Yes, sir; tow through the rivers both ways, large vessels, all of them.

EGBERT DE VILLE, being first duly sworn, was examined in chief by Mr. CONDON, and testified as follows:

Q. Did you know the schooner S. S. Osborn in '72?

A. Yes, sir.

Q. Did you know about how much iron ore she carried and how much coal?

A. Yes, sir.

Q. State.

A. My recollection is she used to bring down from 11 to 1,130 tons of ore.

Q. Gross or net?

A. Gross.

Q. How much coal would she carry?

A. I don't know exactly how much she would carry; used to make out about 1,100 tons.

Q. Her grain capacity was about how much?

508 A. As far as I know she used to carry about 40,000 of wheat, as near as I can tell.

Q. If the gross freight on grain or ore is stated, and the cost of procuring charters for each are given, the cost of loading the grain, tow-bills at the port of shipment, tow-bills through the rivers, tow-bills to elevator on dock or place of delivery, and cost of elevating and shoveling grain, cost of reporting and clearing and telegraphing owner at each end, wages of the crew during the trip, and cost of fitting are given, that which remains of the freight will be what?

A. The net earnings.

Q. Was it usual at that time for the owner to pay for the loading or handling of the coal?

A. No; they usually shipped it free of handling.

CORNELIUS REWELL, being first duly sworn, was examined in chief by Mr. CONDON, and testified as follows:

Q. You knew the schooner S. S. Osborn in '72?

A. Yes, sir.

Q. About what quantity of iron ore would she carry?

A. About 1,100 and 10 or 12 tons, along there.

Q. About how much wheat?

A. I don't know, but I should think from what ore she carried she would carry about 40,000; I could not tell, for I never was with her in the grain trade.

Q. You were with her in the ore trade?

A. Yes, sir.

Q. You had the opportunity to know how much she would carry?

509 A. Yes, sir.

Q. You heard Captain De Ville's testimony, did you not?

A. Yes, sir.

Q. You heard his statement about obtaining the net earnings of the vessel?

A. Yes, sir.

Q. By deducting the expenses that were stated to him?

A. Yes, sir.

Q. And the rest would be the net profits?

A. Yes, sir.

Q. That you consider the proper way?

A. Yes, sir.

Q. Do you know of any other charges that the vessel would be apt to incur as expenses on the trip, besides those stated?

A. No, sir; I do not.

LYDIA WILCOX, being first duly sworn, was examined in chief by Mr. CONDON, and testified as follows:

Q. Do you know what is the average trip from Escanaba of the schooner Osborn, say in '72?

A. Running down from Escanaba about 14 or 15 days.

Q. That is the round trip—going down, unloading and going back?

A. Yes, sir; I think they average about 15 days.

Q. What means did you have of knowing that?

A. Well, from knowing when she arrived.

- Q. State how you knew it?
A. By her arrival here and getting despatches.
Q. Here in Cleveland?
510 A. In Cleveland and Escanaba. May be I don't understand you.
Q. State all that you know about it?
A. I know that.
Q. Did you see the despatches from the captain when he was leaving and when he would arrive?
A. Yes, sir.
Q. Where did your husband keep the records, the book and correspondence in regard to his business?
A. It was in our house—in my sitting-room. Often despatches would come to me. I would receive them at the house, and open them.
Q. You had been aboard of her several trips?
A. Yes, sir; we often made the run in five days up.
Q. From Erie to where?
A. To Escanaba.
Q. She was considered what kind of a sailor?
A. Good.
Q. There have been exhibits attached to Mr. Wilcox' deposition, charges for towing the schooner S. S. Osborn, by the City of Detroit.
A. The first was the City of Concord.
Q. The Northern Transportation Company?
A. Yes, sir.
Q. Do you know anything about that tow-bill?
A. Yes, sir; I know she towed her from Fox Island to Mackinaw.
Q. The next morning after the collision?
A. Yes, sir; the next morning; took us about 11 o'clock, got in there in the evening some time.
Q. The City of Detroit, what did she do?
511 A. She towed us from Mackinaw to the rivers. The St. Clair river and Port Huron.
Q. Were you delayed any at Mackinaw?
A. We were there 3 days; between two and three.
Q. What detained you there?
A. Waiting for something to tow us down.
Q. There has been a charge of John Bates there at Mackinaw, \$5; what was that for?
A. Dockage.
Q. While you were mooring at his dock?
A. Lying alongside the dock.
Q. The tug Kate Williams. What about her bill? She towed you from where?
A. From Port Huron to Cleveland.
Q. (Mr. TERRELL.) Will the books show the trips of the boat?
A. I don't know whether they will or not.
Q. Do they show when she entered, and when she cleared, and show each trip up to the time of the collision?
A. I never looked to see whether they did or not.
Q. (Mr. CONDON.) Do you know whether or not in the latter part of August and the month of September, the winds are fresher, and vessels make any better time than they do in July?
A. Yes, sir; sometimes they make better time in the fall?
Q. Is there any difference?

A. I could not say.

Adjourned to 2 o'clock p. m.

Met pursuant to adjournment.

Mr. WILCOX recalled, was examined in chief by Mr. CONDON, and testified as follows:

Q. Suppose that the Osborn were running with ore from Escanaba to Cleveland, instead of Erie, how much shorter would her trip be on an average—her run down be?

512 A. About a day—not to exceed a day.

Q. What is about the usual time required to discharge a cargo of coal or iron ore with prompt despatch, in Erie or in Cleveland, or coal in Chicago or Milwaukee?

A. The Osborn has been unloaded in a day and about a day and a half in Erie, and I guess it takes two days here, or two and a half.

Q. Coal at Chicago or Milwaukee, about how long?

A. Two to three days.

Q. Do you know whether or not from the 15th of August to the 20th of September, there was a demand for such vessels as the Osborn for grain, coal, and ore carrying business?

A. Yes, sir.

Q. You are positive charters could be obtained if she were ready?

A. Yes, sir.

WILLIAM GOODWIN, being first duly sworn, was examined in chief by Mr. CONDON, and testified as follows:

Q. State your name, age, residence, and occupation?

A. William Goodwin; 40 years of age; residence, Cleveland; occupation, a ship-broker.

Q. How long have you followed that occupation?

A. About eight years—between seven and eight.

Q. Who is your copartner?

A. Mr. H. J. Webb.

Q. What business were you in in August and September, '72?

513 A. In the same business.

Q. Chartering vessels?

A. Chartering vessels and engaging cargoes.

Q. Do you know what the coal freights were from Cleveland to Chicago and Milwaukee on or about the 15th of August, '72?

A. On a vessel of that size, \$2 a ton, free, net; on smaller vessels it would be \$2.10. I mean by that, no expense of handling.

Q. Free in and out?

A. Yes, sir.

Q. Do you know what they were on or about September 5th, '72, on coal?

A. Yes, sir.

Q. What were they from Cleveland to Chicago or Milwaukee on a vessel the size of the schooner S. S. Osborn?

A. About \$2.10, free.

Q. Do you know what they were on or about the 16th of August? If so, state, for a vessel the size of the S. S. Osborn?

A. There is a charter on the 14th at \$2.10; on the 16th, \$2.25, and they went up and down. Smaller vessels, I should think, about the same, would be fair, \$2.10 and \$2.15; but I don't see any charters at \$2.15, free, in and out (referring to memorandum).

Q. I notice you refer to a paper; what is that?

A. It is a record from our day-book.

Q. And a copy of your day-book containing what?

A. Containing our charters from day to day, as we made them.

Q. At that time?

A. Yes, sir.

Q. In whose handwriting is that?

514 A. My own.

Q. Do you know that the rates stated in there are correct?

A. Yes, sir.

Q. The information you have given in your testimony has been derived from an inspection of the original books?

A. From our actual transactions recorded in our book at that time.

Q. Were you chartering vessels for iron-ore cargoes at that time?

A. Yes, sir.

Q. State what rates were paid for carrying iron ore on or about the 16th of August, '72, vessels of the size of the S. S. Osborn.

A. We haven't got from August 15th to September 14th, along there; we haven't got Escanaba charters; it was all Marquette, and the S. S. Osborn was really not a Marquette vessel. I can give you the rates from Marquette; she was a little too large; it would not be profitable.

Q. Do you know how the freights to Marquette at that time compared with those to Escanaba?

A. I could not swear from any actual knowledge. If you paid \$4 from Marquette, an Escanaba charter would be about 3 dollars and a quarter. If it was \$6 to Marquette, to Escanaba it would be \$5; but the freights to Marquette at that time were \$4.

Q. Do you know what the freights were about the 1st to the 3rd of September on ore from Escanaba?

A. We haven't got any charter in Sept. earlier than the 6th.

Q. What were they then?

A. \$5.75 from Marquette to Erie would be about the same as
515 to say \$4.75 from Escanaba to Cleveland.

Q. Do you know what the rates were for vessels of that class carrying ore from Escanaba the 16th and 17th?

A. Yes, sir. There were three charters at \$5 a ton, one on the 16th, one on the 17th.

Q. Do you know whether there was a demand for vessels of the size of the S. S. Osborn during the time from about the 16th of August to the 26th of September?

A. Yes, sir; there was a lively demand for vessels.

Q. Do you know about the average length of time the S. S. Osborn—such a vessel—makes the trip from Cleveland to Escanaba and back?

A. I should think about 15 or 16 days. I know the schooner Escanaba made 15 trips in one season, running light—the one that George Stone sailed. The ordinary trip from Cleveland and back would be about 15 days, perhaps 16.

Q. Does that account for loading and unloading?

A. Yes, sir; that gives time for discharging.

REC. 243—16

516

Exhibit A to Mr Wilcox's deposition.

CLEVELAND, O., Sept. 9th, 1872.

Schooner S. S. Osborn in account with Quayle and Martin, ship-builders and contractors, 212 Central Way:

To 1 spar.....	\$250 00
" 1 bowsprit.....	40 00
	<hr/> \$290 00

Rec'd payment Nov. 16th, '72.

QUAYLE AND MARTIN.

*Exhibit B to Mr. Wilcox's deposition.**Schooner S. S. Osborn to Wm. H. Radcliffe, Dr.*

1872.

August 16th.	To 7,578 f't oak plank.....	4c..	303 12
	" 3,856 " " flitch.....	3½..	134 75
	" 100 " square timber...	40c..	40 00
	" 2,038 " decking.....	5c..	101 90
	" 1,372 " pine.....	4c..	54 88
	" 425 " ".....	5c..	21 25
	" 1,585 lb. iron.....	8c..	126 80
	" 1,400 " spike.....	9c..	126 00
	" 130 " nails.....	8c..	10 40
	" 250 " oakum.....	15c..	32 50
	" 285 " pitch.....	3c..	8 55
	Strap hinges and screws.....		3 00
	But's, hooks, and stopels.....		3 00
517	To 1 doz. 3 in. screws.....		1 00
	" 30 carriage bolts.....	15c..	4 50
	" 15 lbs. clinch rings...	26c..	3 75
Sept. 12th.	" 35 " lead.....	15c..	5 25
	" 6 " cotton.....	2s..	1 50
	" 2 seam brushes.....		50
	" 472 days' labor.....	3 50..	1,642 00
	" 31 " ".....	4 00..	124 00
21st.	" 160 " ".....	3 00..	480 00
			<hr/> \$3,228 65
Cr. by cash.....			\$2,028 65
" " note of sixty days.....			1,200 00

Rec'd payment in full, as above specified.

Cleveland, Sept. 24th, '72.

WM. H. RADCLIFFE.

*Exhibit C to Wilcox's deposition.**Schooner S. S. Osborn to Wm H. Radcliffe, Dr.*

1872.

Sept. 26.	To 225 f't decking.....	5c..	12 25
	" 20 lbs. spike.....	9...	1 80
	" 5 lbs. oakum.....	13...	65
	" 10 " pitch.....	3c..	30
	" 4 days' labor.....	3 50..	14 00
			<hr/> \$29 00

Cleveland, Ohio.

Rec'd payment.

WM. H. RADCLIFFE.

518

EXHIBIT D.

CLEVELAND, O., August 26th, 1872.

Sch'r S. S. Osborn and owners to Cleveland Towing Association, Dr.

To towing from A. and G. W. d'k to dry-dock and extra \$10 00

Correct.

Rec'd payment.

D. M. HUDDL, ESQ., *Master.*
Collector.

Tug Peter Smith.

EXHIBIT E.

CLEVELAND, O., Aug. 15th, 1872.

Sch'r S. S. Osborn and owners to Cleveland Towing Association, Dr.

To towing from lake to A. and G. W. dock..... \$20 00

Rec'd payment.

D. M. HUDDL, ESQ.

Tug Martin.

EXHIBIT F.

\$250.00.]

AUG. 14TH, 1872.

Wm. Seamens, master the sch'r S. S. Osborn, to steam-tug Kate Williams,
Dr.

For towing from Pt. Huron to Cleveland, two hundred and fifty dollars.

To B. O. WILCOX,
Painesville, O.(Endorsed:) This d'ft was paid and returned. Sept. 30th, 1872. J.
S. James, agt. Wilcox. Painesville, O., Sept. 30, 1872.

519

EXHIBIT G.

*Bark S. S. Osborn to Northern Transportation Co., Dr.*For towing from Fox Island to Mackinaw, p'r steamer City of
Concord..... \$150 00

Cleveland, Aug. 19th, 1872.

Rec'd payment.

AARON WILCOX.

And remitted to J. Colwell.

(Endorsed:)

Pay J. Colwell, esq., cash or order.

A. M. FRENCH & CO.

Pay to the order of A. Wilcox, for collection.

Commercial National Bank, Cleveland, Ohio.

JOSEPH COLWELL, *Cashier.*

EXHIBIT H.

DETROIT, 14th August, 1872.

Sch'r S. S. Osborn to prop'r City of Detroit, Dr.

To towing from Mackinaw to Port Huron..... \$500 00

Rec'd pay.

JOHN PRIDGEON,
*Owner of City of Detroit.*To B. O. WILCOX, Esq.,
Painesville, Ohio.

520

EXHIBIT J.

Schooner S. S. Osborn to A. Lecour, Dr.

1872.

Sept.	4th.	To 5 hours' work repairing bolt for masthead and cross-tree bolts, @ 80c	4 00
		To one band for gib-boom, @	4 00
		" 15 hours' work on truss bands, @ 8 ct'	12 00
		" 79 $\frac{1}{2}$ iron, @ 5 $\frac{1}{2}$ c	4 35
6th.	"	2 draw bands, 112 $\frac{1}{2}$ %, @ 12 $\frac{1}{2}$ c ..	14 00
7th.	"	Repairing 2 draw bands	2
		" 122 $\frac{1}{2}$ iron for bolt sprit-cap, @ 12 $\frac{1}{2}$ c	15 25
		" one marlinspike steeled	50
		" one bolt repaired	25
11th.	"	14 hours' work making straps, &c., re- viring straps & 7 bev- elled washers, @ 5c	11 20
		To 75 $\frac{1}{2}$ iron, @ 5 $\frac{1}{2}$ c	4 13
12th.	"	165 $\frac{1}{2}$ for strap for forestay & cat-head, 12 $\frac{1}{2}$ c	20 63
		" 1 $\frac{1}{2}$ hours' work on shackle & thimble, @ 80c	1 20
		" 2 new thimbles	1 00
16th.	"	11 bolts repaired, @ 40c	4 40
		" 13 $\frac{1}{2}$ nts, @ 12 $\frac{1}{2}$ c	1 63
		" one auger repaired	20
17th.	"	3 links on bowsprit shroud ..	1 20
		" 2 " repaired	30
		" 2 bolts & 2 bevell washers ..	1 00
		" 2 shackles	3 00
		" strap'ing one bull's-eyes	75
		" one eye-bolt & thimble, 23 $\frac{1}{2}$ %, @ 12 $\frac{1}{2}$ c	2 88
19th.	"	4 bolts repaired, @ 40c	1 60
		" 2 bevell washers	50
521	To	2 connection rods & 2 shackle for a <i>vinlg</i>	5 00
		" 4 bolts repaired, @ 20c	80

	"	1	"	for gib-boom, 11 $\frac{1}{2}$ %, @ 12 $\frac{1}{2}$ c.....	1 38
	"	45 $\frac{1}{2}$		chain for back ropes, @ 8c.....	3 60
	"	3		bolts for cat-head, 20 $\frac{1}{2}$ %, @ 12 $\frac{1}{2}$ c.....	2 50
	"	2		bands for anchor-stock, 36 $\frac{1}{2}$ %, @ 12 $\frac{1}{2}$ c.....	4 38
	"	8		bolts, @ 25c.....	2 00
	"	1	"	for shackle.....	25
20th.	"	2		hing'-bands, 75 $\frac{1}{2}$ %, @ 12 $\frac{1}{2}$ c....	9 38
	"			2 links on chain.....	50
	"	6		chain hooks, @ 40c.....	2 40
	"	16 $\frac{1}{2}$		bolts, @ 12 $\frac{1}{2}$	2 00
	"			1 connection rod repaired....	1 00
	"			1 stand for station-boom.....	50
	"			1 link on ring stopper.....	25
21st.	"	3		eye-bolts.....	1 50
	"			1 devil's clan.....	75
	"	26 $\frac{1}{2}$		bolts, @ 10c.....	2 60
	"	107 $\frac{1}{2}$		strap for rail & norman, @ 12 $\frac{1}{2}$ c.....	13 38
					<hr/>
Rec'd payment.					\$166 14

A. LACOUR.
PATRICK KERINELLY.

522

EXHIBIT K.

CLEVELAND, O., Dec. , 1872.

Schooner S. S. Osborn bought of J. W. Grover and Sons, ship-chandlers and grocers, importers and wholesale dealers, 65 & 67 River st., & 97 & 98 Dock:

1 small boat..... 103 00
Paid.

J. W. G. & SONS.

EXHIBIT L.

CLEVELAND, O., Sept. 20th, '72.

Schooner S. S. Osborn bought of Globe Iron Works, office & works cor. Elm & Spruce st's, W. side:

Sept. 9th. To 1 24" windlass..... 97 00
Less bale and lever, 98 $\frac{1}{2}$ %, @ 5 $\frac{1}{2}$ 5 39

\$91 61

Received payment.

GLOBE IRON WORKS,
Per R.

523

EXHIBIT M.

CLEVELAND, O., 19th Sept., 1872.

Schooner S. S. Osborn bought of Upson and Walton, importers and dealers in steel and galvanized wire rope, &c., 129 & 131 River st., and 140 & 141 Dock:

Sept. 2nd.	531 $\frac{1}{2}$ galv'd w. rope	131 $\frac{1}{2}$	71 69
20	5" galv'd hanks	30c	6
3rd.	82 ft. 4" galv'd W. rope, 190"		
215 ft.	3 $\frac{1}{2}$ " do. 342-532"	131 $\frac{1}{2}$	71 82
28	3 $\frac{1}{4}$ " galv'd hanks	22	6 16
9th.	3 $\frac{1}{2}$ Seizing wire	28	75
			156 42
23rd.	180 ft. 3 $\frac{1}{2}$ " galv'd wire rope 277 $\frac{1}{2}$	131 $\frac{1}{2}$	37 40
26	3 $\frac{1}{2}$ " galv'd hanks	22	5 72
			43 12
			199 54
7	4 $\frac{1}{2}$ galv'd iron hanks	25	1 75
			201 29
2			44
2	3 $\frac{1}{2}$ " " "		
			201 73

Rec'd payment.

UPSON & WALTON,
L.

10, 21, '72.

524

EXHIBIT N.

CLEVELAND, O., Sept. , 1872.

Schooner S. S. Osborn bought of Upson and Walton :

1	6" Badger pump	\$70
16	$\frac{1}{2}$ ft. pipe 3 $\frac{1}{2}$ in. flue	85
	Splicing pipe	2
		85 88

Rec'd payment.

UPSON AND WALTON,
L.

EXHIBIT O.

CLEVELAND, O., Nov. 1st, 1872.

Schooner S. S. Osborn bought of S. B. Conklin, sail-maker, &c.:

For making fore S. sail, 184 yds. No. 0 cotton duck, 66c. \$121 44

Rec'd payment.

H. C. MILLES & CO.

Nov. 2, '72.

\$121.44.]

PAINESVILLE, O., Nov. 2, 1872.

FIRST NATIONAL BANK.

Pay to S. B. Conklin, for sch'r Osborn, or bearer, one hundred and twenty-one $\frac{44}{100}$ dollars.

B. O. WILCOX.

525

EXHIBIT P.

CLEVELAND, O., Sept. 21st, 1872.

Schooner S. S. Osborn bought of John O'Neill, No. 117 River st. and Dock:

Aug. 19, 11 $\frac{1}{2}$ hooks.....	17 $\frac{6}{10}$	15 sail needles.....	7 $\frac{5}{5}$	2 51
3 sail hooks.....	1 $\frac{0}{10}$			30
13, 12 $\frac{1}{2}$ spun yarn.....	21 $\frac{6}{10}$	12 $\frac{1}{2}$ marline.....	3 $\frac{00}{24}$	5 16
Sept. 2, 2 $\frac{1}{4}$ hamborline.....	5 $\frac{0}{24}$	2 yds. pas. ceiling.....	3 $\frac{6}{1}$	86
" 56 $\frac{1}{2}$ spun yarn.....	9 $\frac{04}{16}$	6 yds. $\frac{1}{2}$ 3 canvass.....	27 $\frac{6}{46}$	11 80
" side leather.....				2 00
4, 31 $\frac{1}{2}$ spun yarn.....	49 $\frac{6}{16}$	10 $\frac{1}{2}$ putty.....	7 $\frac{0}{7}$	5 66
7, 1 bbl. tar.....	6 $\frac{00}{1}$	6 gal. B. oil.....	6 $\frac{00}{100}$	12 00
" 50 $\frac{1}{2}$ Eng. W. lead.....	6 $\frac{00}{12}$	29 $\frac{1}{2}$ tar'd rope.....	1 $\frac{0}{18}$	11 31
12, 7 $\frac{1}{2}$			7 $\frac{0}{7}$	49
16, 3 oz. spung.....	3 $\frac{8}{16}$	1 P $\frac{1}{2}$ top head.....	6 $\frac{3}{3}$	1 01
" bill paint.....				32 00
" 6 $\frac{1}{2}$ putty.....	4 $\frac{5}{7}$	1 box lamp black.....	10 $\frac{0}{7}$	55
" 147 $\frac{1}{2}$ M. rope.....	29 $\frac{40}{16}$	72 $\frac{1}{2}$ 18 thread rattling.....	12 $\frac{24}{17}$	41 64
17, 90 tar'd rope.....	15 $\frac{20}{16}$	4 $\frac{1}{2}$ le slaps.....	8 $\frac{00}{24}$	17 20
18, 5 $\frac{1}{2}$ houslen.....	12 $\frac{4}{16}$	10 $\frac{1}{2}$ nails.....	7 $\frac{0}{7}$	1 95
" 103 $\frac{1}{2}$ M rope.....	29 $\frac{70}{16}$	4 capisin spars.....	3 $\frac{00}{75}$	23 70
" 6 $\frac{1}{2}$ hamborline.....	15 $\frac{0}{24}$	25 $\frac{1}{2}$ tar'd rope.....	4 $\frac{50}{18}$	6 00
21, 1 set signal-lamps, new style.....				35 00 notpd
19, 2 seam brushes.....	7 $\frac{5}{36}$	7 $\frac{1}{2}$ M rope.....	14 $\frac{0}{20}$	2 15
20, 38 $\frac{1}{2}$ tarred rope.....	69 $\frac{3}{18}$	10 gal. boiled oil.....	11 $\frac{50}{115}$	18 43
				231.72
21, 7 $\frac{1}{2}$ spun yarn.....	12 $\frac{6}{16}$	2 $\frac{1}{2}$ hamborline.....	9 $\frac{3}{24}$	1 89
152 $\frac{1}{2}$ M rope.....	28 $\frac{88}{16}$	3 doz. 1 in. thimbles.....	4 $\frac{0}{1}$	30 38
3 doz. stables.....	7 $\frac{5}{24}$	1 saw file.....	20 $\frac{0}{1}$	95
				33.22

264.94

Rec'd payment.

J. O'NEILL,
F. R.

526

EXHIBIT Q.

CLEVELAND, O., Sept. 7th, 1872.

Schooner S. S. Osborn bought of R. T. Lyon and Son, general commission merchants, Nos. 65 and 67 Merwin street:

5 bbls. of salt, 1.90..... 9 50

Rec'd payment.

R. T. LYON AND SON,
W.

EXHIBIT R.

B. O. Wilcox, sch'r S. S. Osborn, bought of Hebard, Hawley and Co.:

935 ft. round timber, \$40..... \$37 40

August 26th, '72.

Rec'd payment.

W. H. RADCLIFFE,
Per H. & HAWLEY.

EXHIBIT S.

Schooner S. S. Osborn, in acc't with Wm. Smith.

To refitting and fitting out vessel and repairing sails, helping. \$410 00
Shipping foremast, bowsprit, and jib-boom.....

I certify the above bill is correct and paid Sept. 24th, '74, by B. O. Wilcox.

WM. SMITH.

527

EXHIBIT T.

Schooner S. S. Osborn to John Bates, Dr.

For dockage and attendance..... \$5 00

Rec'd payment.

JOHN BATES.

MACKINAW, 12th Aug., 1872.

EXHIBIT U.

CLEVELAND, O., Sept. 21st, 1872.

Schooner S. S. Osborn bought of A. T. Van Tassel & Co., dealers in hardware and stoves:

24 bolts	2 40
Galv. iron.....	3 05
Copper nail.....	50
Labor.....	1 50
	<hr/>
	7 45

Received payment.

A. T. VAN TASSEL & CO.

528

EXHIBIT V.

\$30.00.]

CLEVELAND, Aug. 31st, 1872.

Received of sch'r S. S. Osborn thirty dollars, for fifteen days' work in full up to date.

WM. SMITH.

\$30.00.]

CLEVELAND, Aug. 31st, 1872.

Received of schooner S. S. Osborn thirty dollars, for fifteen days' work in full up to date.

JAMES O'NEILL.

\$30.00.]

CLEVELAND, Aug. 31st, 1872.

Received of schooner S. S. Osborn thirty dollars, for fifteen days' work in full up to date.

JOHN McDONALD.

\$30.00.]

CLEVELAND, Aug. 31st, 1872.

Received of schooner S. S. Osborn thirty dollars, for fifteen days' work in full up to date.

PETER LIEB.

EXHIBIT W.

MILWAUKEE, Oct. 5th, 1872.

Received of schooner S. S. Osborn thirty-two dollars eighty-eight cents, in full for services and job work.

JOHN FELL

529

EXHIBIT X.

\$60.00.]

CLEVELAND, Sept. 9th, 1872.

Received of schooner S. S. Osborn, for services as cook for twenty-four days, at seventy-five dollars per month, sixty dollars.

SYLVESTER SMITH.

EXHIBIT Y.

CLEVELAND, Sept. 28th, 1872.

Estimated cost of head cut-water on gilding (one hundred and fifty dollars)	\$150 00
Foreyard (seventy-five dollars)	75 00
	<hr/> \$225 00

WM. H. RADCLIFFE.

530 W. G. WINSLOW ET AL. }
 vs.
 THE SCH'R S. S. OSBORN. }

Hearing before A. J. Ricks, master, December 18th, 1878.

Present, Loren Prentiss for the sch'r S. S. Osborn.

C. REWELL, called and sworn, was examined in chief by Mr. PRENTISS, and testified as follows:

Q. You reside in the city of Cleveland?

A. Yes, sir.

Q. What has been your business for the last dozen years or more?

A. Sailing.

Q. In what capacity?

A. Master.

Q. Have you resided in Cleveland during all that time?

A. Yes, sir.

Q. Sailed from this port to what ports?

A. Escanaba, Marquette, Chicago, Mil/waukee—pretty much all of the ports on the lake.

Q. In the ore trade and grain trade?

A. Yes, sir; mostly in the ore trade.

Q. Have you sailed this season?

A. No, sir.

Q. The season previous, '77?

A. Yes, sir.

Q. Continuously up to that time?

A. Yes, sir; since '46.

531 Q. For whom have you sailed on your own account?

A. For Captain Bradley.

Q. Sailed between Cleveland, Chicago, and Buffalo?

A. Yes, sir.

Q. You are well acquainted with all those routes ?

A. Pretty well.

Q. During the time you have been sailing have you been acquainted with the length of voyages between Cleveland and Escanaba, and between Chicago and Buffalo ?

A. Yes, sir ; some.

Q. And the charges and expenses of running vessels ?

A. Yes, sir.

Q. Also the rates of freights that have prevailed during the time ?

A. Yes, sir.

Q. You may state whether you have a general knowledge of the going rates of freight through August and Sept., 1872.

A. Yes, sir ; but the vessel I was in then was contracted in the spring for the season.

Q. But you had a general knowledge of the freights of that year ?

A. Yes sir.

Q. Were you acquainted with the schooner S. S. Osborn ?

A. Yes, sir.

Q. Do you know the amount she would carry in ore and grain ?

A. Well, she would carry a little over 1,100 ton ; I suppose 1,110, 1,115, or 1,120, probably, along there.

Q. Tons of ore ?

A. Gross tons ; yes, sir.

Q. Of wheat about how much ?

A. About 40,000 bushels, I should think.

Q. Have you a recollection as to the demand or lack of demand
532 for vessels in 1872, in August and September ?

A. There was quite a demand for vessels then.

Q. Any difficulty in getting employment for any good vessel ?

A. No difficulty at all.

Q. Taking things as they were from the 9th of August, '72, and up to the 26th of Sept., inclusive, the same year, what would be the net value of the use of the S. S. Osborn during that time per day ?

A. Well, I should think from \$210 to \$220.

Q. What would be the difference between the net value of the use of the Osborn for that period and of the American Union, assuming the American Union to carry, say, 840 or 850 tons of ore, and a proportionate amount of wheat or grain ?

A. I could not tell exactly without figuring on it, because the American Union would carry about 850 tons, somewhere's there, and the Osborn over 1,100, and there would be just that much difference of course. I could not tell exactly without figuring on it.

Q. Suppose the difference to be, say, 280 tons, that the Osborn would carry that much more, about how much a day would that make her worth more than the Union ?

A. I could not tell that without figuring on it some ; but of course she would be worth more, because the Union's expenses would be just about as much as the Osborn's expenses would be ; she would have the same number of men ; got to have two mates, captain, and cook, all the same ; and about all the difference would be in discharging ; she
533 would not have as much to pay in discharging, and the towing bills would not be quite as much.

Q. Suppose the Osborn to carry 280 tons more, how much would that increase the expenses of the Osborn over and above what the expenses of the Union would be if carrying 850 tons ?

A. Not but little; because, as I said before, she had the same number of men, and the same amount of provisions.

Q. Would it make a difference of over \$75 or \$80 in her actual expenses?

A. I should not think it would.

Q. Take the freight on that additional amount and deduct from it the expenses, and what would that represent?

A. I don't understand that.

Q. It would represent the difference in the earnings, wouldn't it?

A. Why, yes; of course it would.

Q. So the net use of the Osborn would be worth as much more then than the Union as the difference in earnings would show?

A. I should think it would.

Q. What do you say would be the difference per day?

A. It would be the difference the amount of the freight would come to.

Q. What would be about the average length of voyage from Cleveland to Escanaba and back, making all allowances for the weather; an average trip for that season of the year?

A. Well, I should think about 15 days, and I can give you my
534 reason for thinking so: The year before, I think it was, I came into Cleveland 5 trips handrunning on Monday morning alternately; that was 14 days, you see, five trips handrunning; but fifteen days, I think, would be about the average.

Q. That includes the delays—loading and unloading?

A. Yes, sir; the round trip.

Q. (The MASTER.) Those five trips you made were from Escanaba?

A. Yes, sir.

Q. (Mr. PRENTISS.) Vessels have made the trip in as low as nine or ten days?

A. I made the trip once in eleven days, and only once; and I have been three weeks at it; but 15 days is about the average. That has been my experience.

Q. (The MASTER.) You base your estimate of the value of this boat upon that particular season?

A. Yes, sir.

Q. (Mr. PRENTISS.) And that part of the season?

A. I can give you my reason for that: As I said before, the vessel that I was in was the Bradley; we were contracted that year for \$2.50 for so many trips, but I don't know the number of trips.

Q. \$2.50 a ton?

A. Yes, sir; with the privilege of hauling off one trip, when we chose to go where we liked.

Q. What were you hauling?

A. Iron ore. Captain Bradley contracted with Webb at \$5.00 for ore; that was double what we were getting.

Q. (The MASTER.) When was that?

A. That was, I think, the 16th of September, '72. This state-
535 ment, I think, can be got from Mr. Webb's books; I know it can. The Thomas Quayle was chartered on or about the 16th of September for four trips, at \$5.00, from Escanaba to Cleveland, for ore.

Q. What would be the length of trip from Cleveland to Chicago with coal, and Chicago to Buffalo with wheat that season of the year?

A. Well, I should think about twenty-two days.

Q. That would include the loading and unloading?

A. Yes, sir. Well, you have the average; of course, sometimes you

would make a good deal quicker trip up; sometimes get a good passage to Chicago, and sometimes a bad one; I should think the average would be about 22 days. I have made it shorter and been longer.

J. H. ANDREWS, called and sworn on behalf of the respondent, was examined by Mr. PRENTISS, and testified as follows:

Q. Where do you reside?

A. Painesville, Ohio.

Q. How long have you lived there?

A. I have lived there ever since 1834.

Q. What is your occupation?

A. Seafaring life.

Q. In what position?

A. Master of a vessel.

Q. For how many years past?

A. I have been master of a vessel for about 27 years, I guess.

Q. On the lakes?

536 A. On the lakes.

Q. How long have you sailed from the port of Cleveland to the different ports upon the lakes?

A. I think I have sailed a vessel out of here 26 years.

Q. Did you sail in '72?

A. A part of the year.

Q. What portion?

A. I made one voyage in the spring, and one and a half in the fall.

Q. Vessel laid up for repairs during the summer?

A. No; I was building a vessel.

Q. During the time you have sailed on the lakes what ports have you sailed to and between?

A. I guess there is hardly any that I have not been to.

Q. You are well acquainted with the sail between Cleveland and Escanaba?

A. Yes, sir.

Q. And Cleveland, Chicago, and Buffalo?

A. Yes, sir.

Q. And the ports on the lakes generally?

A. Yes, sir.

Q. During the time you have been sailing have you had general knowledge in relation to the length of the voyages between those points, the rates of freights, and the expense of running the vessel?

A. I suppose I have; yes, sir.

Q. And as to the earnings of the vessel?

A. Yes, sir.

Q. State whether you had such general knowledge of the freights, expenses, etc., of vessels in '72, during August and September.

537 Q. Was you acquainted with the S. S. Osborn?

A. Yes, sir.

Q. Suppose that the Osborn will carry from 1,120 to 1,130 tons of ore, or 40,000 bushels of wheat, and taking the times as they were in 1872 for vessels, from the 9th of August, say, up to and including the 26th of September, what would be the net value of the use of the vessel per day during that time, in your judgment?

A. I should say over \$200.00.

Q. Do you know the American Union?

A. Yes, sir.

Q. Suppose that she would carry from 840 to 850 tons of ore and a

proportionate amount of grain, what would be the difference in the net value per day in the use of the Osborn over that of the Union?

A. Whatever would be the amount of the ore she would carry, less the expense of handling it.

Q. Suppose there was a difference of 275 or 280 tons, what would be the difference in expense that the Osborn would have more in carrying that large a quantity?

A. Allowing a certain rate for handling it, I suppose?

Q. About what would the expense be without going into the details—everything?

A. If I remember right it was about 20 cts. a ton for handling it.

Q. Any other charges—any additional tonnage?

A. Well, there would probably be \$5 to \$8 difference in trimming the two vessels.

Q. How much in the towing, if anything?

A. Perhaps \$10 or \$12 in the towing.

Q. Any other expenses of the vessel than those you have mentioned?

538 A. No other that I know of.

Q. It would be worth as much more as the freight would be worth more, deducting those expenses?

A. Yes, sir.

Q. How much over \$200.00 would the Osborn be worth at that time? You said over two hundred dollars; how much over?

A. I should think \$215 or \$220 a day.

Q. How would the value of the use of the vessel be, say from the 26th to the 20th of September, 3 days more?

A. The same rate I should judge.

Q. (THE MASTER.) What time does navigation close, generally, on the lakes?

A. Some years it closes earlier than others; as a general thing, by the first of December; still, I have run a good deal later than that.

Q. (MR. PRENTISS.) What would be the average length of a voyage from Cleveland to Escanaba and back, going up light and coming down with ore?

A. Fifteen days.

GEORGE STONE, called and sworn on behalf of the respondent, was examined in chief by MR. PRENTISS, and testified as follows:

Q. State how long you have been a captain on the lakes.

A. I commenced in the fall of '48.

Q. Been sailing as captain ever since?

A. Yes, sir.

Q. Every season?

539 A. Yes, sir; every season.

Q. On your own account?

A. Partly, and Capt. Bradley's firm, and before that I was in with another gentleman.

Q. During all that time you have been sailing from what ports to what ports?

A. Well, most all, I guess, that is on these waters.

Q. Have you a general knowledge of the time required for sailing vessels to make a voyage from one point to another?

A. Well, I think I have.

Q. From Cleveland to Escanaba?

A. Yes, sir; I have been in that trade a great deal.

Q. And Cleveland to Chicago, and Chicago to Buffalo?

A. I have been in that trade a good deal.

Q. And during all the time you have sailed, what knowledge have you had as to the general going rates of freights on grain and ore and coal and such things?

A. I keep it before my mind pretty vividly most of the time, but going back to those years I could not tell exactly.

Q. I want to know whether you have a general knowledge of the going rates of freights of vessels?

A. I think I have.

Q. Do you remember the season of '72 as to the general character of the season, and as to the demand for vessels, and as to the rate of freights?

A. Well, it was what we term a very good season.

Q. We will take the time, say from the 9th of August, '72, up to the 26th and 29th of September of the same year, what would be the
540 net value of the use of the S. S. Osborn per day during that time, assuming that she will carry 1,120 to 1,130 tons of ore, and amount 40,000 bushels of wheat or grain, taking things as they were during that time?

A. To get at that I should have to take the average of the freights, wouldn't I?

Q. You would have to form a judgment based upon that.

A. According to the statements I have seen, and what little knowledge I had of it, I suppose the rates of freight would average about \$4.00 a ton between those dates. I am speaking more of ore because I was more in that trade than I was in the grain trade at that time. I think there would be no trouble in the vessel getting what those gentlemen swore to, from \$200 to 220 a day with those freights.

Q. Well, give us your best judgment, taking things as they were at that time, and from all the information you have obtained in relation to it, what would you say would be the fair net value per day of the use of that vessel?

A. Well, I have just said it would range from \$200 to \$220 a day, with those rates of freights, taking them at \$4.00 a ton, which seems to be the average.

Q. Do you remember how it was as to the extent of the demand for vessels that year, during August and September whether there was a full demand for them?

A. Well, I should suppose there was; yes, sir. In fact we were contracted for the season, and I don't pay as much attention to it as if we had been running wild, as we term it, picking up freights at the
541 ports each trip.

Q. You had a contract based upon the lower rates of the previous year?

A. Yes; we had a contract based on \$3.50, I think, if I remember rightly.

Q. About what would be the difference in the net value per day between—about what would be the difference between the use of the Osborn carrying say 1,120 to 1,130 tons, and the use of the American Union carrying say, 840 and 850 tons during that time?

A. Well, you would have to figure that out; I could not tell exactly. I should suppose, if I was to guess at it, \$75.00 a day, but it is easy to tell by figuring.

Q. It would be the difference of freight, the additional quantity?

A. Less the expense.

Q. About how much would be the difference of handling 75 or 80 tons?

A. Whatever there would be in the towage through the river St. Clair; also into the ports, the handling, going out and in; it would be the difference in the cost of handling. The running of the vessel, most of the time perhaps, would not vary any.

Q. About what would that be on 275 or 280 tons, say?

A. I should have to do some figuring before I could testify accurately about that. I should say, if I was going to suppose it, about \$70.00.

Q. You estimate it at about \$75.00 a day?

A. Yes, sir.

Q. (The MASTER.) What would such a vessel as the Osborn be worth, say in August and September, '72—what would the vessel have sold for at that time?

542 A. Well, that is a pretty hard question for me to answer. Vessels were pretty high at that time. I should say \$50,000. I should suppose it could be sold for fifty thousand dollars at that time. I may be entirely wild on that.

Q. What do you say would be the average length of trip between Cleveland and Escanaba?

A. Well, 15 days we term as the average.

Q. From Cleveland to Chicago and back to Buffalo, how long?

A. Well, I should have to put that a little higher than those gentlemen who testified ahead of me; I should put it at 25 days.

Q. As the average trip?

A. Yes, sir; still I may be all wrong in that.

Q. Is there any especial advantage in freighting ore at that particular season over any other freight?

A. Not that I know of. I think the ore was at a disadvantage of the grain freights at that time.

Q. You could do better by running wild, carrying promiscuous freights, than you could carrying ore?

A. Oh, yes, sir. I owned an interest in the Bradley and the Quayle that the captain speaks of, she was chartered about that time; I think it was the 16th of September, if I remember rightly; she was chartered for three trips at \$5.00 a ton—I have forgotten the number of trips—it was \$5.00 a ton.

Q. (Mr. PRENTISS.) You have actual knowledge of the going rates of freights then?

A. I did so far as she was concerned; she got just the going rates.

543 EGBERT DE VILLE, called and sworn on behalf of the respondent, was examined by Mr. PRENTISS, and testified as follows:

Q. What is your business?

A. I have been sailing.

Q. How many years?

A. I have been sailing quite a good many years.

Q. From what ports?

A. All of the lakes.

Q. How many years?

A. I have been sailing ever since about '50, or more or less since.

Q. In what capacity?

A. Been in every capacity from cook up.

Q. Take it from '71 up to this time?

A. My business was ashore principally at that time. I have been in the vessel-agency business, ship broker and insurance, some.

Q. At what place?

A. Here in Cleveland.

Q. Procuring cargoes for vessels?

A. Yes, sir.

Q. Were you in that business in '72?

A. Yes, sir; a part of the year in ship brokerage and insurance.

Q. You may state what means you had of knowing in the course of your business as to the demand for vessels, the rates for freights, and earnings of vessels, the value of the use of vessels in 1872.

A. I know it was an exceptionally good season; it was extraordinary for that.

544 Q. Had you the means of knowing what the earnings of vessels were, and the value of the use of them, during that time?

A. Yes, sir.

Q. Do you know the American Union?

A. Yes, sir.

Q. Do you know the Osborn?

A. Yes, sir.

Q. What in your judgment was the net value of the use of the Osborn from August 9th, '72, up to the 26th and say the 29th of September, of the same year, taking into consideration the circumstances as they existed at that time?

A. Well, my opinion is she was worth \$200 to \$220 a day net—that sized vessel.

Q. What would be the difference in value of the use of the Osborn above that of the use of the American Union, estimating that from her increased size she would carry 275 tons more of ore, and a proportionate amount more of grain than the American Union?

A. I should think the difference in their profits would be the difference in what they would carry less the expense of handling the cargo, and the amount of the difference there would be in towing the vessel.

Q. What would be the difference in the extent of the towing and handling on account of the increased quantity?

A. I should think it would be somewhere in the neighborhood of seventy-five to eighty dollars.

Q. The amount she would be worth more per day could be got at by ascertaining—

A. How many day' she would be on a trip—

545 Q. How many days she would be earning that. Her use, you think, would be worth that much more?

A. Yes, sir; it would.

Q. What would be about the fair average rate of freight on ore from Escanaba to Cleveland during that time?

A. Well, I should think four dollars a ton would not be too much compared with what my recollection is of the grain freights.

Q. In September it was higher?

A. Yes, sir.

Q. Early in August a little lower?

A. A little lower in August.

Q. What would be the fair average length of a voyage between Cleveland and Escanaba, going up light and coming down with ore?

A. Well, I have kept a little tra'k of it and I find about 15 days is a fair average.

Q. Including the time for loading and unloading?

A. Yes, sir; making the entire trip.

Q. (The MASTER). In what does the bulk of the expense of operat.

ing a vessel of that kind consist; the handling, running expenses, handling cargoes?

A. Well, the handling of cargoes, wages and provisions. It depends a good deal upon how fast you would make your trips which would be the biggest.

Q. In making a trip from here to Escanaba say, and you carried 800 tons?

A. Do you want to know which would be the largest item of expense?

Q. Yes, which would be the largest item of expense?

A. No, the handling of the cargo would not be the largest item—it seems to me now from a rough estimate, I could not tell myself
546 without figuring it, but my ideas are at present that the biggest item would be the manning of the vessel.

Q. Making a rough calculation, according to your best judgment, say 800 tons at \$5.00 a ton gross, the round trip, 15 days, would be \$4,000, \$266.00 gross a day. You would count the expense including the handling of the cargo at about \$50.00 a day?

A. The whole expense of the vessel would be considerably more than that, the difference in the profits of the vessels—the American Union and the Osborn—if there was 300 tons difference in their carrying capacity—the expenses of the American Union was just the same as the Osborn's was with the exception of the difference in handling the ore, and the trifle difference there would be in the tug bills, and the balance would be the net profit of the Osborn over and above the American Union. The tug bills would not be over three hundred and sixty dollars to four hundred dollars from Cleveland to Escanaba, the way times were then.

Q. How many days of the 15 would be taken up in receiving and discharging the cargo?

A. It would depend upon whether the ore was all ready. If the ore was all ready—

Q. Taking the average.

A. Shippers in making the contract claim four days; three days for unloading, and one here to procure it. As a general rule they can load a vessel inside of a day when the ore is ready, and they are prepared to load the vessel when she came. The usual time for discharging
547 ing a vessel would be two to three days; it would depend upon how the weather was. I think it would spoil three days, but you might call it four to five days.

Q. (Mr. PRENTISS.) Taking the average at both ends?

A. It would be from four to five days, loading and unloading.

Q. Making the average running time 10 to 11 days?

A. Yes, sir; the trips have been shortened up from what they used to be. To Chicago and back to Buffalo we used to call the average trip 25 days, but of late years the tugs have got to towing the vessels further, and that has shortened the trips a little. I think 22 days would be a fair average now.

Q. (The MASTER.) Do you agree with Captain Stone as to what the Osborn would have sold for in '72?

A. My impression is she was an A 2 vessel, and if she was she would sell for \$55,000 (one of the witnesses remarks that the Osborn was an A 1). Then there was no question of her being worth \$55,000 the way vessel property was selling at that time.

Adjourned to to-morrow at 10 o'clock.

D. L. PENNINGTON, being duly sworn, testified as follows:

Q. (By Mr. L. PRENTISS.) What is your age and business?

A. Age, forty-one; business, vessel-owner and ship-broker.

Q. How long have you been engaged in the business of owning ships and vessels, and in the ship-broker business?

A. Since 1865.

Q. During all that time?

548 A. With the exception of one year.

Q. What year was that?

A. That, I believe, was in 1870.

Q. Did you reside at Cleveland during all that time?

A. Yes, sir.

Q. You may state what knowledge you have had in relation to the vessel business, the length of voyages required between different points, the rates of freight, the expenses of running and the earnings of vessels and the value of their use during that time.

A. Have had such experience during that time with vessels I have owned and with other vessels for which I have figured that I am probably qualified to tell something about it.

Q. Are you acquainted with the length of voyages required between Cleveland and Escanaba for the ore trade?

A. Yes, sir.

Q. And were you acquainted with the demands for vessels and the rates of freight and earnings of vessels in the months of August and September, 1872?

A. Yes, sir.

Q. Are you acquainted with the S. S. Osborn and the American Union?

A. Yes, sir.

Q. Supposing that the Osborn had capacity for carrying from one thousand one hundred and twenty to 1,130 tons of ore, what would have been the average net value of her use per day from August 9th, 1872, to the 27th of September, 1872, in your opinion?

A. From \$220 to \$225 a day.

549 Q. Suppose that the Osborn would carry from 270 to 280 tons more of iron ore than the American Union, what would be the difference in the net value of the use of the two vessels per day during that time?

A. I regard the difference about from \$50 to \$60 per day.

Q. That is, that the Osborn would earn that much more?

A. Yes, sir.

Q. How would you ascertain the difference?

A. The difference would have to be ascertained by figures as to the gross earnings at the prevailing rates at that time and the expenses.

Q. What would be the difference in expense between carrying 850 tons and 1,120 or 1,130 tons for a voyage—for a cargo, say?

A. There would be no difference in seamen's wages; there would be a difference in handling the extra cargo that the Osborn carried over the Union. There would be about \$40 difference, I take it, in towing through the river each way, the Osborn being the larger vessel, and probably \$20 in harbor towing, amounting to \$100, probably.

Q. That is, the expense would be that much more, in your judgment?

A. The expense would be that much more.

Q. And that expense would consist of what?

A. The extra handling of cargo, river and harbor towing.

Q. Then the freight on that increased amount, less this expense, would be the difference in the value of the use of the vessel per day, taking the length of time the voyage would require?

A. Yes, sir.

Q. (By the MASTER.) Were you acquainted with the rates of freight on ore from Escanaba to Cleveland during that time?

A. Yes, sir.

Q. What were those rates?

A. Well, the rates of freight during that year gradually advanced from the beginning of the season to its close. The rates of freight at the beginning of August from Escanaba to Cleveland were about \$3.00, and at the close of September—

Q. Well, say fore part of September, if you please.

A. In the fore part of September, about \$4.00 or \$4.25.

Q. And the middle, say?

A. Middle of September, perhaps \$4.75.

Q. How was it the latter part of August?

A. The latter part of August or first of September, about \$4.00.

Q. Is your estimate of the net average value per day based on the idea that the schooner would have a contract, or that she was running wild?

A. That she was running wild.

Q. You think there would be no trouble, then, from August 9th to September 26th, for a schooner of her capacity, running wild, to have earned on an average the sum you name a day?

A. You refer to the Osborn?

Q. Yes; that vessel.

A. No, sir; the freights were high and very active—a great demand for vessels.

Q. There was a great demand for vessels, you say?

A. Yes, sir.

Q. Do you know the schooner Osborn?

551 A. Yes; I knew her.

Q. What do you say she would have sold for about August or September, 1872?

A. Well, I don't know.

Q. I do not ask you what she was worth, but what would she have brought at that time, considering the great demand for vessels, the rates of freight, and any other advantages or disadvantages that there were at that season?

A. I would rather not answer that question.

Q. If you do not consider yourself competent, say so.

A. I should have to think that up a little before I could give an intelligent answer.

Q. (By Mr. PRENTISS.) How many trips would a vessel be able to make, in the time mentioned, between Cleveland or Escanaba, running up light and coming down with ore?

A. I should think she would easily make three trips. They usually count on from 13 to 16 days for a trip; perhaps average fifteen.

WM. G. WINSLOW ET AL. }
 vs. } Appeal in admiralty.
 SCHOONER S. S. OSBORN ET AL. }

Testimony taken before Special Commissioner A. J. Ricks, under reference to report damages, &c.

Proctors for both parties appeared before the undersigned as master, and the following testimony was taken :

Proctor for libellant offered in evidence the charter of the schooner Osborn for season of 1872, to which proctor for claimant objected. The charter is filed by master herewith as evidence, and objection of claimant overruled.

Proctor for libellant introduced as evidence the master's report made and filed in the district court.

It was agreed by the proctors for both parties that the American Union was under charter for the season of 1872 to carry iron ore from Escanaba, Mich., to Erie, Pa., at \$2.20 per ton, and from Escanaba to Cleveland, Ohio, at \$2 per ton, and that said charter was made in the fall of 1871. It was also admitted that the said American Union's carrying capacity was 900 tons of iron ore, and that of the Osborn was 1,100 tons.

It was further agreed that the master in the district court, if
 553 sworn, would state the facts as to the admissions of the owner of the Osborn as to the damages sustained by the American Union, the same as set forth in said master's report.

BLISS O. WILCOX, the owner of the schooner Osborne, heretofore sworn and examined, testified further as follows :

The wages of the first and second mate of the schooner Osborne, during the summer of 1872, were as follows :

Wages of 1st mate, \$80 per month.

Wages of 2nd mate, 62½ per month.

During August and September of that year, the wages of common seamen were at rate of \$2 per day.

According to her charter with the Cleveland Iron Mining Company the Osborn was to have \$2.20 per ton for iron ore carried from Escanaba, Mich., to Erie, Pa., and at rate of \$2 per ton on ore from Escanaba to Cleveland, Ohio.

As to what I admitted before the special master in the district court as to the demurrage to be allowed the American Union during the time she was detained for repairs, I have this to say :

It was claimed by Mr. Terrell, her proctor, that she was detained twenty-three days undergoing repairs on account of injuries received in this collision, and in answer I told him that it was not right that the Osborne should stand damages for all that time, because during that time the stern of the Union was being repaired on account of another collision. He claimed 21 days' delay here and 2 days at
 554 the other end, making twenty-three in all.

I have no personal knowledge of the time the American Union was delayed.

I admitted the amount of the demurrage there found by the commissioner because my counsel told me there would be a new hearing as to

the damages in the circuit court, and I consented to those amounts to save expense.

Cross-examined by libellant's proctor:

All the bills for repairs for the American Union were there at the time of the agreement, and I looked over several bills and some were thrown out. I think I looked over all the bills. I threw out quite a number of bills; some of them because I knew Captain Parsons could not come to prove them. I do not object now because I know they cannot be proved, but because I know they were not just.

I presume I examined the Stevens and Priestly bill. I objected to some item on that bill, and it was thrown out. I think the expenses of an ordinary trip of the Union was ascertained from her books, which were produced at the office of Mr. Terrell. I might have made some of the estimates as to demurrage. I don't swear I did or didn't. Captain Post made most of the estimates for me, and acted at my request. He was pretty well informed as to such matters, and went with me to Terrell's office. He made most of the estimates that were not made from the Union's books. We went over it pretty fully. The
555 charter of the Union was not at Mr. Terrell's office. You (Mr. Terrell) had some figures there that you got at the office of the company where Union was chartered.

I know that Mr. Terrell then said that the Union was under charter. I will not say the statement now produced is the same statement or not.

(By Mr. PRENTISS.) I had no personal knowledge of the items set up in the bills. I took them as they were set out in the several bills. I was repairing the Osborn at the same time the Union was being repaired, and I know she was there, but I did not observe the exact time.

Examination of BLISS O. WILCOX resumed:

The Osborn, during the season of 1872, up to the time of the collision, made six trips; one trip to Cleveland, five to Erie, and on the last trip at the time of the collision was bound for Erie.

I made a verbal arrangement with Mr. Miller, the broker with whom I made the contract, that I was to make one-half the trips to Erie and one-half to Cleveland under that charter. They compelled me to go to Erie more than Cleveland. Every trip I made my cargo was from 100 to 175 tons short of the capacity of the vessel, and on the last trip I had to lay at Escanaba ten or eleven days for my cargo. There was several days delay the trip before, and there were delays every trip. I complained of these matters to the Cleveland Iron Mining Company, and told them if they did not furnish me full cargoes and give
556 me better dispatch and let me come to Cleveland I would throw up the charter. They did not comply with my request. The next trip they ordered her to Erie, and the load was short, and there was delay in loading. I took the right to disregard the charter at the next load, and did so.

After the vessel was repaired I took a load of coal and iron to Milwaukee, and from Milwaukee to Buffalo a load of grain, and the Iron Mining Company made no objections. They made no requirement to fulfill the contract or made no claim for damages. The Osborn made one ore trip under her said charter after the collision, and after the Milwaukee trip, and she left Escanaba on the 26th October, arrived at Erie on 8th November, and finished unloading on 11th or 12th of Nov., 1872.

LYDIA WILCOX, being sworn, says:

I was on the Osborn the last trip she made from Cleveland to Escanaba and back, and know that she was delayed in taking her cargo from 1 p. m., July 30th to August 9th at 6 a. m. The cause of delay was fault of the mining company in not furnishing us a load. Her cargo on that trip was over 100 tons short of a full load. They could not furnish the full load without a further delay of 24 hours, to which Capt. Wilcox objected, and proceeded on his trip.

557 Captain JOHN E. POST, being sworn, says:

I have been a master six years, and I know the Osborn. I was present at Mr. Terrell's office at the time of a conversation between him and Capt. Wilcox as to the damages to be reported by the master in the district court in this case.

Twenty-one days' delay at Cleveland and two days at Escanaba was the time agreed upon as the delay of the American Union for the purpose of that hearing. I was acting for Mr. Wilcox in that matter, and I had no personal knowledge of the delay except what Mr. Terrell said. He made about all the figuring. There was some dispute between them as to the demurrage, and it was left to me. I made a calculation and proposed \$1,500 as the sum. Mr. Terrell claimed \$1,750. It was finally agreed it should be \$1,600.

Mr. Wilcox said he did not care so much about the sum to be reported, as he intended to appeal the case.

558

Charter.

This article of agreement between B. O. Wilcox, of Painesville, Ohio, as owner of the following vessel, viz, the schooner S. S. Osborn, and the Cleveland Iron Mining Co., made this 18th day of Nov., 1871, witnesseth:

That the said B. O. Wilcox, for the consideration hereinafter mentioned, agree to transport iron ore with said vessel from Escanaba, Michigan, to Cleveland, Ohio, or Erie, Pennsylvania, commencing on the opening of lake navigation in 1872 and continuing the trips, without intermission, until the contract is fulfilled, it being understood and agreed that the said vessel shall not be required to leave for a cargo of ore a later date than November 10th.

The freight shall be at the rate of two (2) dollars per gross ton (of 2,240 lbs.) when delivered at Cleveland, and (2) two and $\frac{20}{100}$ dollars per gross ton when delivered at Erie.

In consideration of the irregularities in length of trips of vessels, the said Cleveland Iron Mining Co. shall be allowed an average on each cargo of three (3) days' time for loading vessels at Escanaba and of one day to furnish docks for unloading vessels at Cleveland and Erie, time at Escanaba to be reckoned from the hour when vessels report and are ready to load until loaded; at Cleveland and Erie from the hour when vessels report ready to unload until dock room is furnished; Sundays, public holidays, and time lost in consequence of heavy sea or
559 storms or other causes beyond control of said Cleveland Iron Mining Co. not to be counted. Time of reporting vessels ready to load or to unload not to date from an hour earlier than eight o'clock a. m. nor later than 5 p. m.

If, when all the cargoes herein contracted for are transported and delivered, it is found that the average time of detention exceeds the average of four days for each trip, as above stipulated for, the said Cleveland

Iron Mining Co. shall pay to the said B. O. Wilcox demurrage at the rate of seven cents per gross ton on one average cargo for each day (of 24 hours) of such excess.

A special order for each cargo shall be obtained at the office of the said Cleveland Iron Mining Co. at Cleveland.

In witness whereof the said parties have hereunto set their hands the day and year first above written.

B. O. WILCOX.
CLEVELAND IRON MINING CO.,
Per FRED. A. MORSE, Sec'y.

[Stamp.]

And afterwards, at the said January term, A. D. 1879, viz, on the 15th day of March, the following decree was entered :

560

Final Decree.

W. G. WINSLOW ET AL.

vs.

THE S. S. OSBORN, BLISS O. WILCOX, CLAIM-
ant and cross-libellant.

} Appeal.

This cause came on to be heard before the honorable John Baxter, circuit judge, upon the report of the master and the testimony taken before him, and the exceptions of the claimant and cross-libellant to said report, which was argued by counsel, and, upon consideration thereof, it is ordered, adjudged, and decreed that said exceptions be, and the same are hereby, overruled, and said report be, and the same is hereby, in all things confirmed, and the court find that there is due the said Bliss O. Wilcox upon his said cross-libel the sum of \$4,965 $\frac{72}{100}$, with interest from the 7th day of January, 1879, aggregating at the date of this decree the sum of \$5,021.84, being the balance due to him upon a division of the damages, as heretofore ordered in this case, and that said Wilcox also recover one-half the costs of this suit, to be taxed, the whole costs being taxed at \$, and that said libellants recover one-half of the said costs.

And it appearing to the court that after the seizure of the said schooner American Union upon said cross-libel, Wm. G. Winslow and Hezekiah J. Winslow, as principals, and Rufus K. Winslow and
561 B. L. Pennington, as sureties, executed and delivered to the said Bliss O. Wilcox, cross-libellant in that cause, their bond in the penal sum of thirty-three thousand eight hundred and eighty-eight and $\frac{72}{100}$ dollars, to abide by and answer to the decree in this cause under said cross-libel, in the district court or any appellate court and which this cause might be appealed, and that said bond was in due form of law, and that upon the delivery of said bond the marshal released said schooner American Union.

It is therefore ordered and decreed that the said Wm. G. Winslow, Hezekiah J. Winslow, Rufus K. Winslow, and B. L. Pennington pay to the said Bliss O. Wilcox the said sum of four thousand nine hundred and sixty-four and $\frac{72}{100}$ dollars, with interest thereon from the 7th day of January, 1879, aggregating at the date of this decree the sum of \$5,021.84, within ten days from the entering of this decree, together with one-half of the said costs, and in default thereof that execution issue to collect the same.

And it is further ordered that the said Bliss O. Wilcox pay to the

clerk one-half of said costs within ten days, and in default thereof that execution issue to collect the same.

The libellants in open court, claim and appeal from the foregoing decree to the Supreme Court of the United States, which is allowed, and the amount of the bond to be given upon said appeal is fixed \$10,000.00;

and said Bliss O. Wilcox also claims, in open court, an appeal from the foregoing decree to the Supreme Court, which appeal is allowed, and the court fix the bail to be given by him upon such appeal at the sum of \$10,000.00.

563

Copy.

Know all men by these presents that we, William G. Winslow and Hezekiah J. Winslow, as principals, and Rufus K. Winslow and B. L. Pennington, as sureties, are held and firmly bound unto Bliss O. Wilcox in the sum of ten thousand dollars, to the payment whereof well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 21st day of March, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas the above-bounden William G. Winslow and Hezekiah J. Winslow has appealed to the next Supreme Court of the United States from a decree of the circuit court of the United States for the northern district of Ohio, bearing date the 15th day of March, A. D. 1879, in a cause wherein the said William G. Winslow and Hezekiah J. Winslow were libellants, and the said Bliss O. Wilcox and the schooner S. S. Osborn were respondents:

Now, therefore, the condition of this obligation is such that if the above-named appellants, William G. Winslow and Hezekiah J. Winslow, shall prosecute their appeal with effect, and pay all such damages, costs, and expenses as shall be awarded against them as such appellants therein, then this obligation to be void; otherwise to remain in full force and effect.

WILLIAM G. WINSLOW,
HEZEKIAH J. WINSLOW,
By H. L. TERRELL,

Att'y in Fact.

RUFUS K. WINSLOW. [SEAL.]
B. L. PENNINGTON. [SEAL.]

Sealed and delivered in presence of—

(Indorsed :) No. 3600. In the circuit court of the United States for the northern district of Ohio. Wm. G. Winslow et al. vs. S. S. Osborn et al. Appeal bond. Approved and filed March 21st, 1879. M. Welker, judge.

564

Copy.

Know all men by these presents, that we, Bliss O. Wilcox, as principal, and J. S. Casement, as surety, are held and firmly bound unto William G. Winslow and Hezekiah J. Winslow, Rufus K. Winslow and B. L. Pennington, in the sum of one thousand dollars, to the payment whereof well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 8th day of May, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas the above-bounden Bliss O. Wilcox has appealed to the next Supreme Court of the United States from a decree of the circuit court of the United States for the northern district of Ohio, bearing date the 15th day of March, A. D. 1879, in a cause wherein the said Wm. G. Winslow and Hezekiah J. Winslow were libellants and appellees and claimants, respondent to the cross-libel of said Bliss O. Wilcox and appellees, and the said schooner S. S. Osborn and Bliss O. Wilcox, respondent and cross-libellant, were appellants, respondents:

Now, therefore, the condition of this obligation is such that if the above-named appellant, Bliss O. Wilcox, shall prosecute his appeal with effect, and pay all such damages, costs, and expenses as shall be awarded against him as such appellant therein, then this obligation to be void; otherwise to remain in full force and effect.

B. O. WILCOX. [SEAL.]

J. S. CASEMENT. [SEAL.]

Sealed and delivered in presence of—

A. L. TINKER.

J. P. AXTELL.

(Indorsed:) No. 3600. In the circuit court of the United States for the northern district of Ohio. William G. Winslow et al. vs. Sch'r S. S. Osborn. Appeal bond. Approved and filed May 8th, 1879. M. Welker, dist. judge.

565 THE UNITED STATES OF AMERICA,

Northern District of Ohio, Eastern Division, ss:

I, Augustus J. Ricks, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct and complete transcript of the record of all the proceedings had in said court in the cause wherein William G. Winslow and Hezekiah J. Winslow, as owners of the schooner American Union, are libellants and appellants, and Bliss O. Wilcox, claimant and owner of the schooner S. S. Osborn, is cross-libellant and appellant, as the same appears from the files and records of said court now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Cleveland, in said district, this 15th day of July, A. D. 1879, and in the one hundred and fourth year of the Independence of the United States of America.

[SEAL.]

AUGUSTUS J. RICKS, *Clerk.*

566

Supreme Court of the United States.

WILLIAM G. WINSLOW & HEZEKIAH J. }

Winslow

vs.

THE SCH'R S. S. OSBORN,

AND

BLISS O. WILCOX

vs.

THE SCH'R AMERICAN UNION. }

In admiralty. Libel and cross-libel.

To the honorable the Supreme Court of the United States:

The appeal of William G. Winslow and Hezekiah J. Winslow, the above-named libellants in the original libel, claimants in the cross-libel

REC. 243—18

and appellants, respectfully sheweth that on the day of August, A. D. 1872, these appellants filed their libel in the district court of the United States for the northern district of Ohio against the schooner S. S. Osborne, her tackle, apparel, &c., in a cause, civil and maritime, for the recovery of damages alleged to have been sustained by them to the schooner American Union by collision with the said schooner S. S. Osborne in Lake Michigan, and that said schooner S. S. Osborne was arrested upon said libel, and was discharged on said Bliss O. Wilcox filing his claim and entering into stipulations; and said Bliss O. Wilcox thereupon filed his answer to said libel, and also his cross-libel against the said schooner American Union, to recover damages sustained by him in said collision, upon process issued upon which cross-libel said schooner American Union was arrested, and was discharged upon these appellants filing their claim and stipulations; that thereupon these appellants filed their answer to said cross-libel, and 567 such proceedings were had in said cause that on the 26th day of December, 1876, a final decree was made and pronounced therein by the said district court, wherein it was in substance adjudged that these appellants recover against the said schooner S. S. Osborne, her tackle, apparel, &c., the sum of four thousand and thirty dollars, and that said cross-libel be dismissed.

And that, after such final decree, the said Bliss O. Wilcox, claimant of said schooner S. S. Osborne, attempted to appeal therefrom to the circuit court of the United States for the northern district of Ohio, and the said causes were thereby attempted to be removed into the said circuit court. A motion was duly filed in said circuit court by these appellants to dismiss said pretended appeal, which motion was granted by the court; but subsequently said court ordered said entry stricken out, and entered an order that said motion to dismiss be overruled; and said causes thereupon were, in fact, tried anew. And such proceedings were had in the said circuit court that afterwards, on the 24th day of Sept., A. D. 1878, the said circuit court made a decree in said cause, whereby it was decreed that the said final decree of the district court be reversed, with costs, and it was found that both said colliding vessels were in fault; and it was thereupon adjudged that the damages arising from said collision be divided. And thereupon, after the ascertainment and division of damages, it was, on the 15 day of March, 1879, adjudged by said circuit court that said Bliss O. Wilcox recover against said schooner American Union the sum of five thousand twenty-one & $\frac{8}{10}$ dollars, and that said Wilcox have execution, and that the stipulators for these appellants cause their stipulations to be fulfilled, which said decree of the said circuit court is, as these appellants are advised, erroneous, and ought to be reversed.

Whereupon these appellants appeal from said order or decree of said circuit court overruling their motion to dismiss said pretended 568 appeal, and from the whole of said decree, as far as it finds said schooner American Union in fault for said collision, and as far as it adjudges against these appellants a division of damages, and respectfully pray that the decree of the said circuit court, and the libels, answers, pleadings, depositions, evidence, bill of exceptions, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, if necessary to hear the same beyond determining the question of the jurisdiction of said circuit court, and that the said decree of the circuit court, as far as it finds any fault against said schooner American Union and decrees a division

of damages, and adjudges that said Bliss O. Wilcox recover anything against said schooner American Union, or the appellants, may be reversed, and a decree made dismissing said cross-libel with costs, and adjudging that these appellants recover their damages aforesaid against said schooner S. S. Osborne, her claimant and stipulators, or such other decree as to the said Supreme Court may seem just.

WILLIAM G. WINSLOW, &
HEZEKIAH J. WINSLOW.

Cleveland, Ohio, March 21st, 1879.

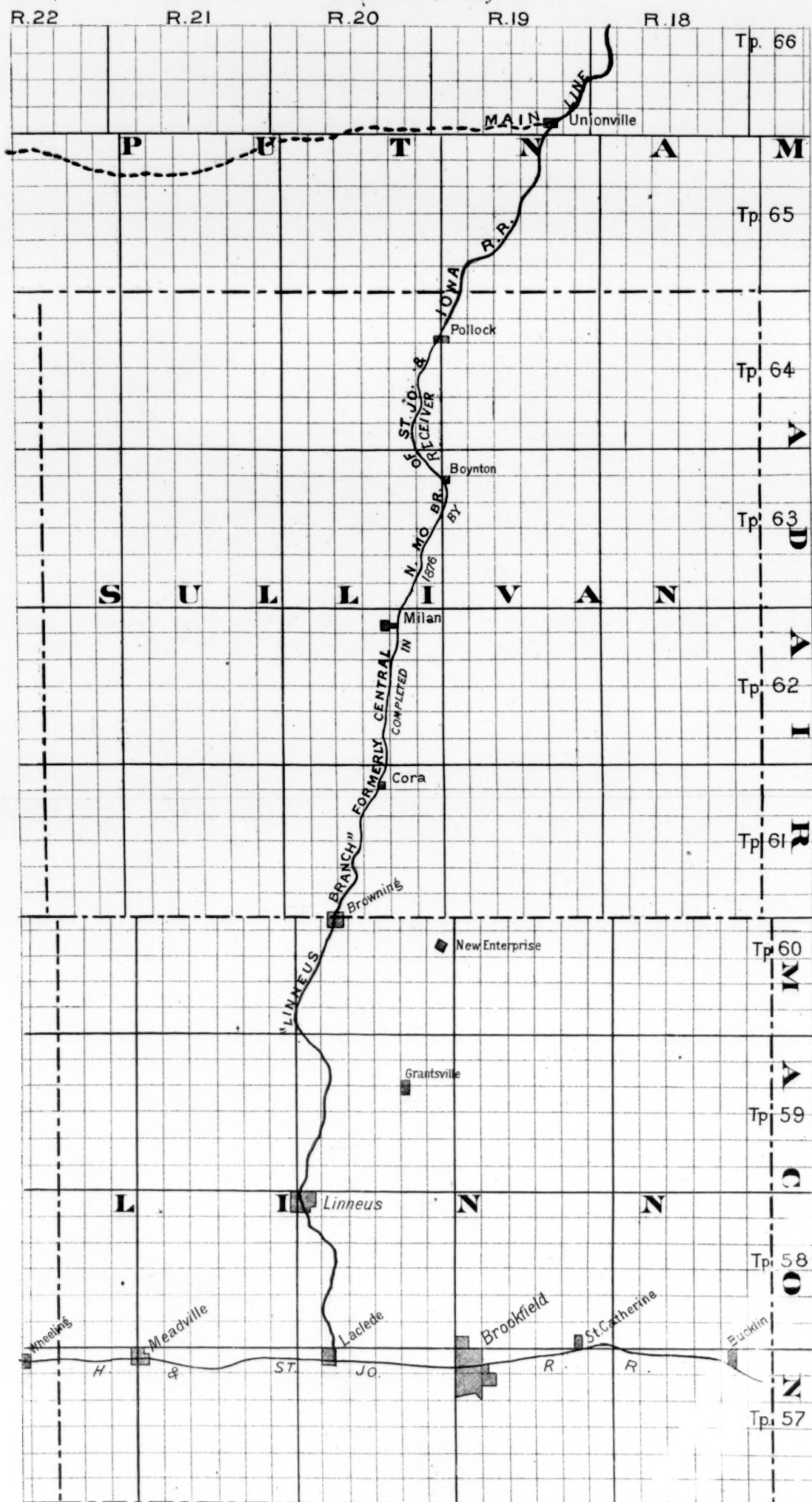
H. L. TERRELL,
Proctor for Appellants.

(Indorsed:) Supreme Court of the United States. William G. Winslow & Hezekiah J. Winslow vs. Sch'r S. S. Osborne, and Bliss O. Wilcox vs. Sch'r American Union. Appeal. Filed March 21, 1879. H. L. Terrell, proctor for appellants.

(Indorsement on cover:) No. 243. William G. Winslow and Hezekiah J. Winslow, appellants, vs. Bliss O. Wilcox, owner and claimant of the schooner S. S. Osborne. N. Ohio C. C. U. S. Filed 13th September, 1879.

PLAT SHOWING LOCATION OF **B. & S. W. Ry.**

IN THE STATE OF MISSOURI.
H.A. Sumner, Ch. Eng'r.



N. Hodge.
Car Wheel.
Nº 8,526. *Patented Nov. 18, 1851.*

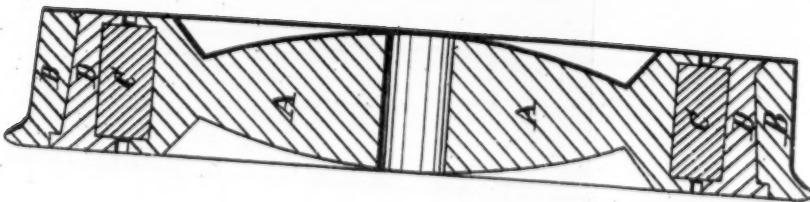
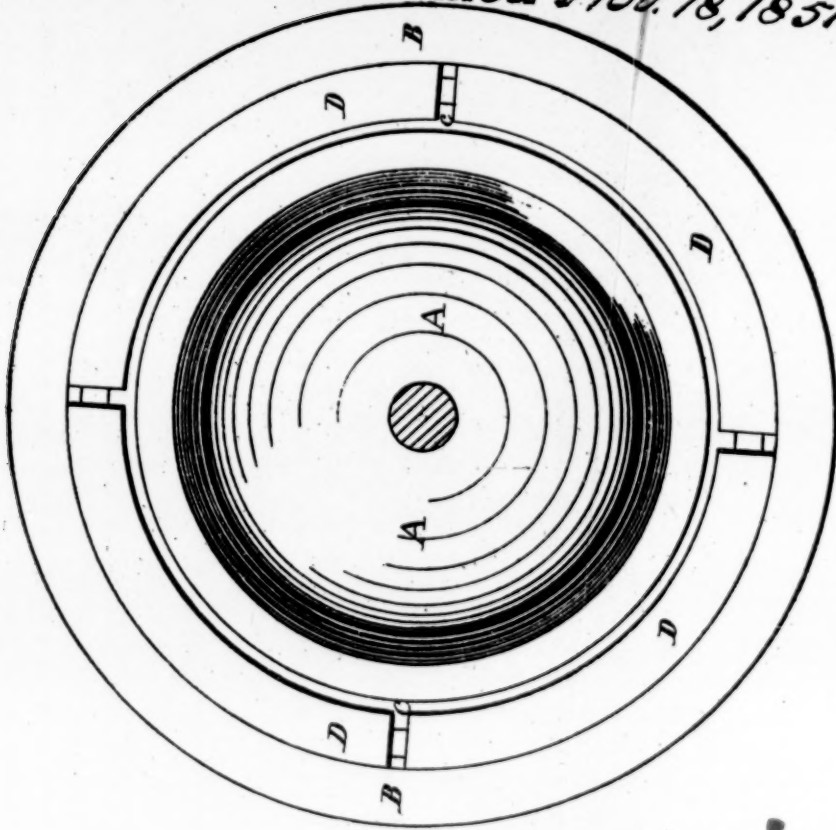
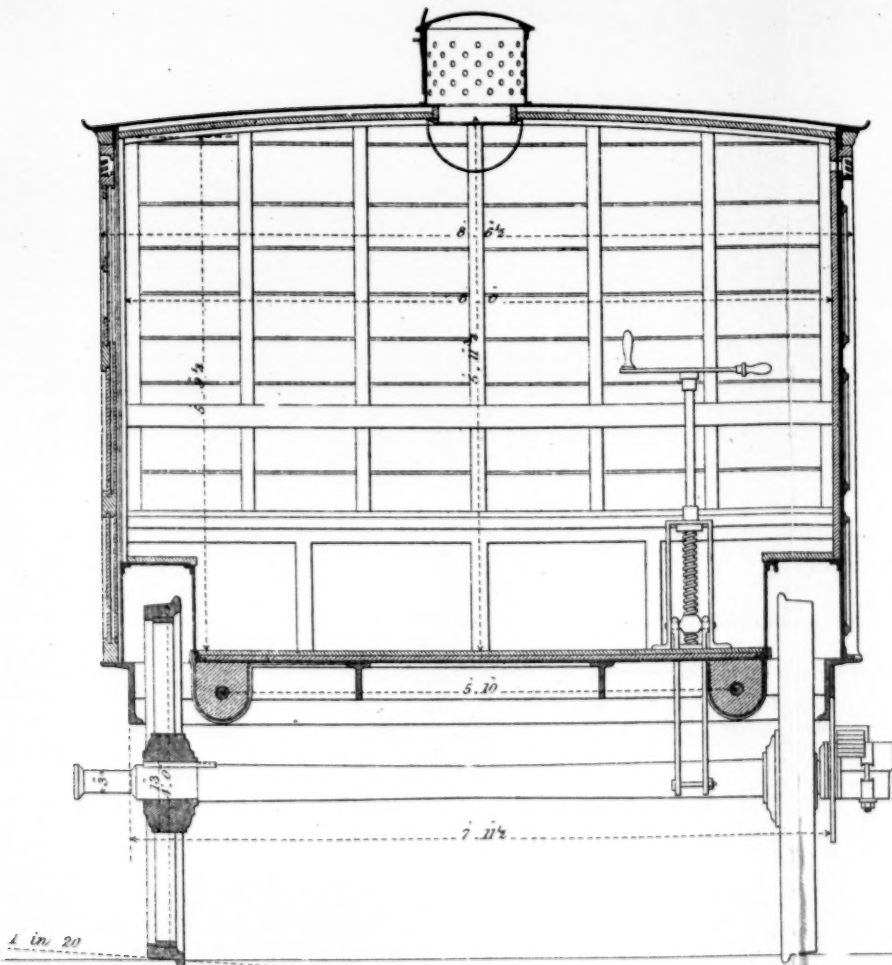


Plate XXXV.

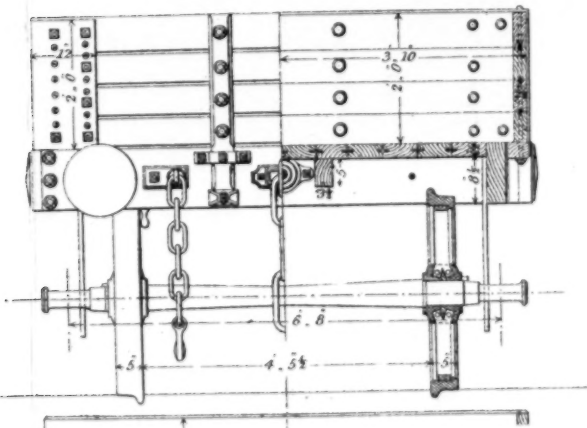
THIRD CLASS CARRIAGE
GREAT WESTERN RAILWAY.



TRANSVERSE SECTION.

RAILWAY WAGGONS.

OPEN BOX WAGGON.



RAILWAY MACHINERY:

A TREATISE ON THE

MECHANICAL ENGINEERING OF RAILWAYS:

EMBRACING

THE PRINCIPLES AND CONSTRUCTION

OF

ROLLING AND FIXED PLANT;

ILLUSTRATED BY

A SERIES OF PLATES ON A LARGE SCALE, AND BY NUMEROUS ENGRAVINGS ON WOOD.

BY

DANIEL KINNEAR CLARK, C.E.

VOLUME SECOND—PLATES.



BLACKIE AND SON:

GLASGOW, EDINBURGH, LONDON, AND NEW YORK.

MDCCLV.

No. 58,447.

{ 1865.
2229.

Jayne.

253.
3438

EDWARD MELLON,

Of Scranton,
County of Luzerne,
State of Penna.

Applying Tires to Locomotive Wheels.

Rec'd October 6, 1865.

Petition " " "

Affidavit " " "

Specification " " "

2 Drawings " " "

Model " " "

Cert. dep.

1 Cash \$15. Octr. 5, 1865.

Add'l fee Cert.

1 " " " \$20. Sept. 20, '66.

Examined Sept. 3, '66 = Jayne.

2 Issue Ann Stout, Sept. 6, 1866.

4 Patented Octr. 2, 1866, &

Recorded vol. 206, page 529.

Circular Sept. 8, '66.

MUNN & Co.,
Pres.

1865.

1865.

Rejected & Spec. & thin dr.

reind. Feb'y 10, '6.

Rejected Apl. 23, '6.

IMP'D MODE OF ATTACHING TIRES TO
WHEELS OF LOCOMOTIVES.

1865.

FIG. 1.

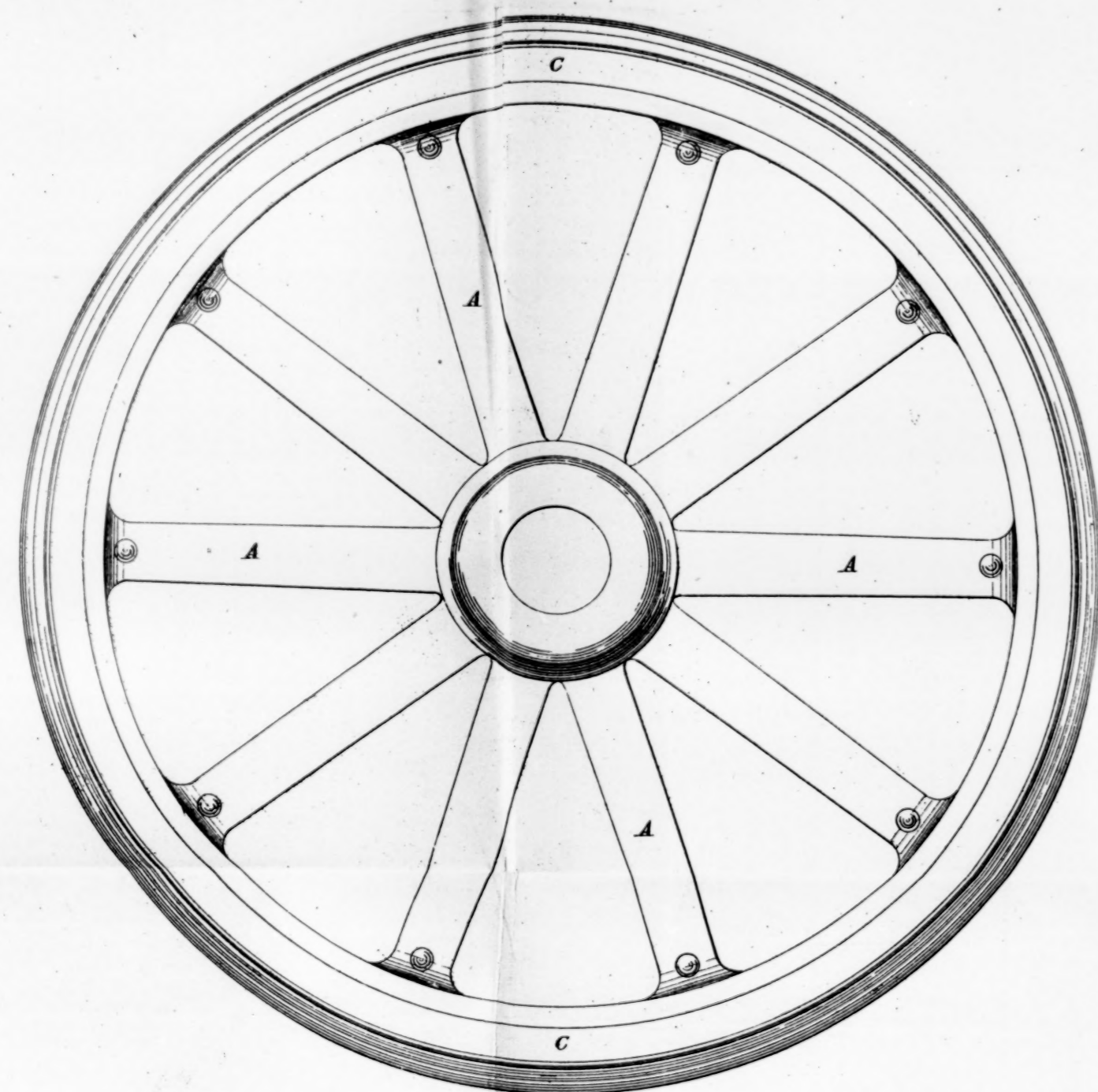


FIG. 2.

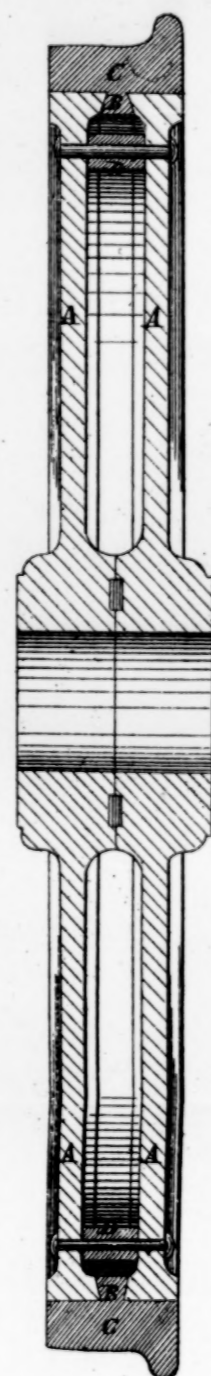


FIG. 3.

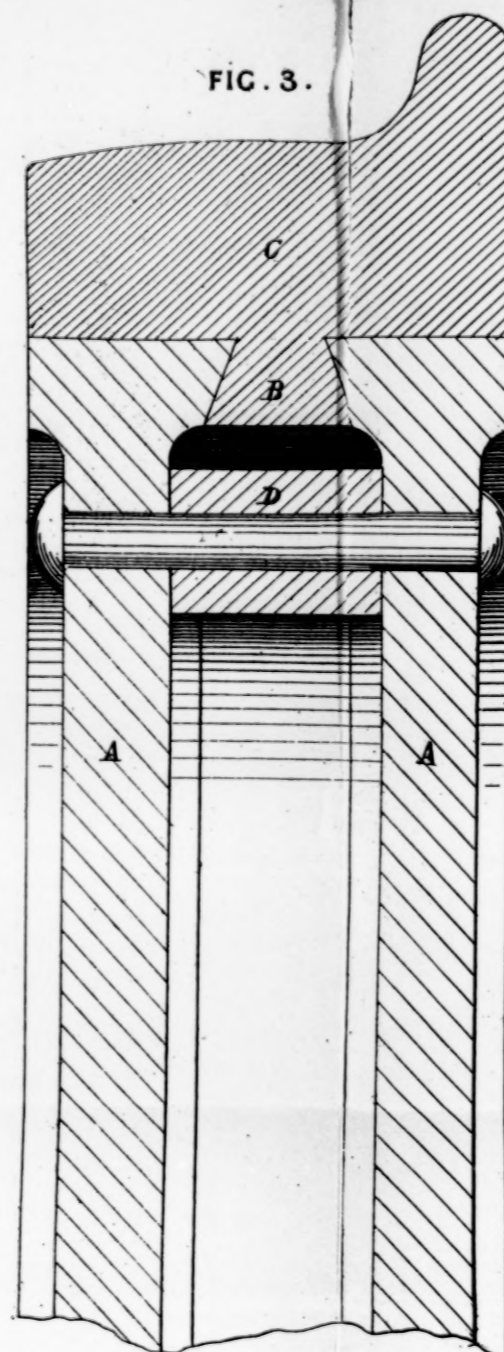


FIG. 4.

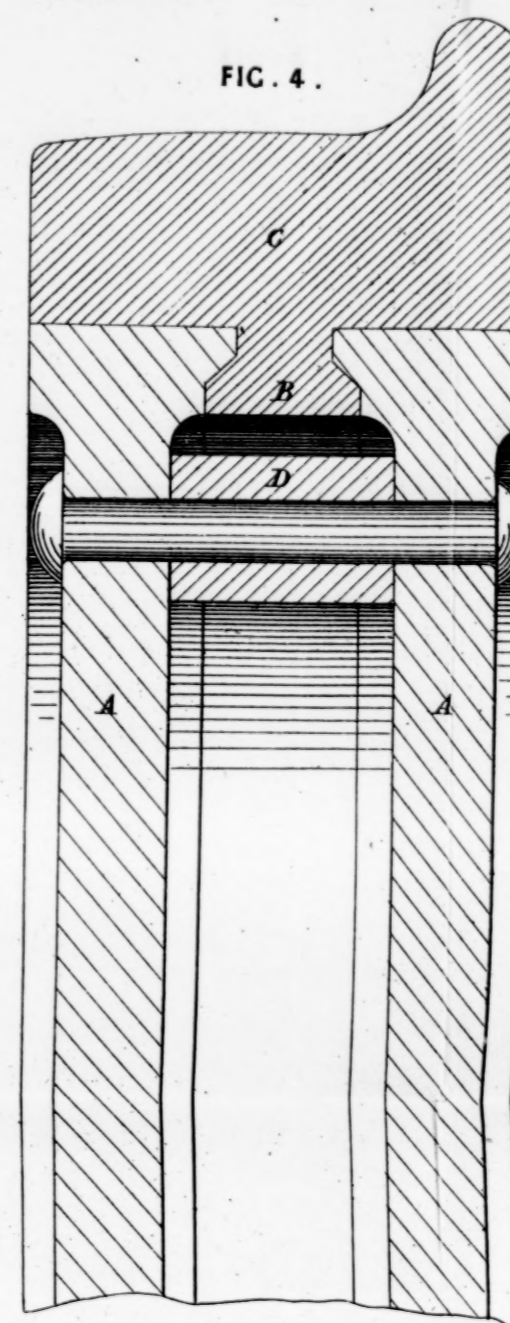


FIG. 10.

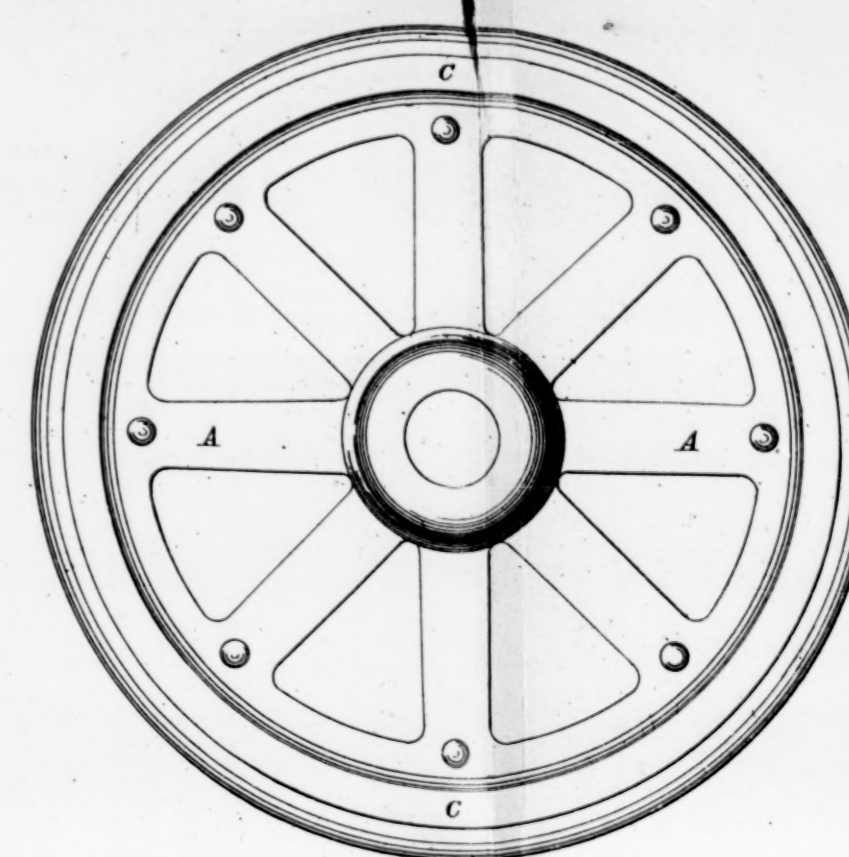


FIG. 11.

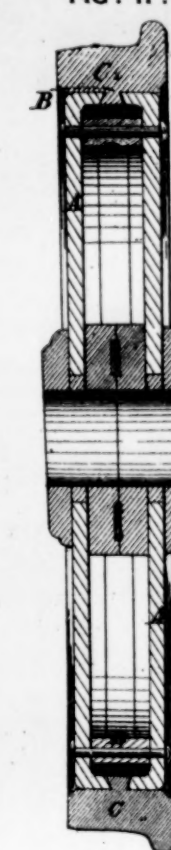


FIG. 5.



FIG. 6.

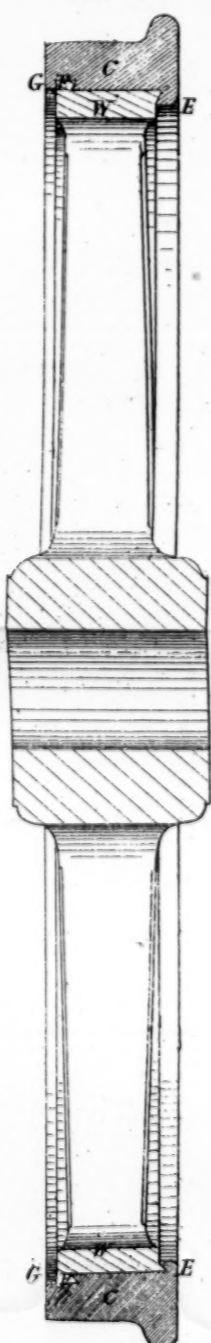


FIG. 7.

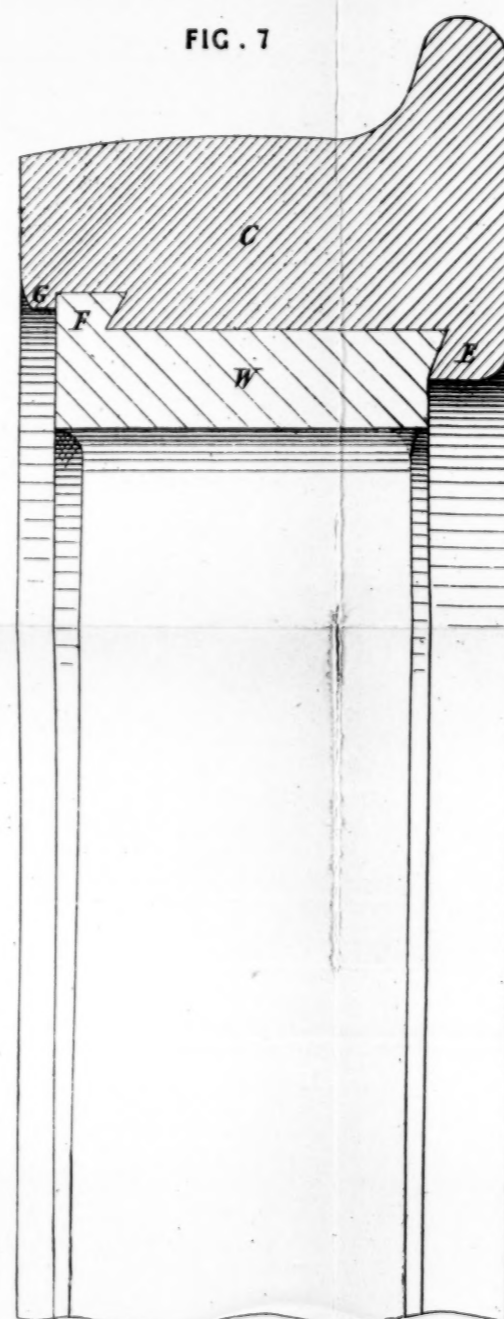


FIG. 8.

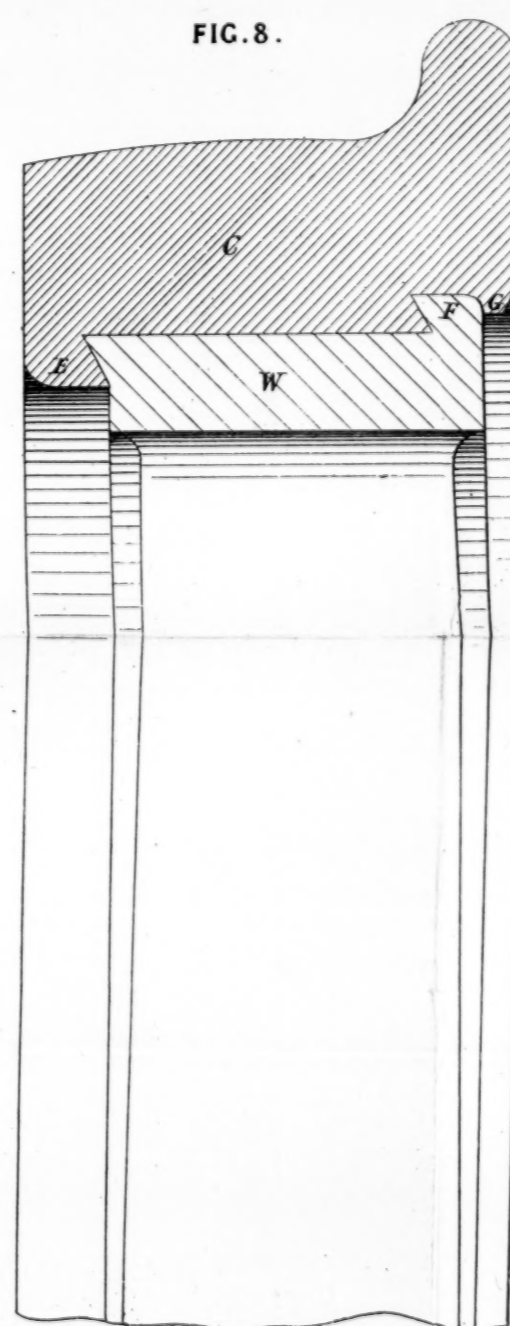


FIG. 9.

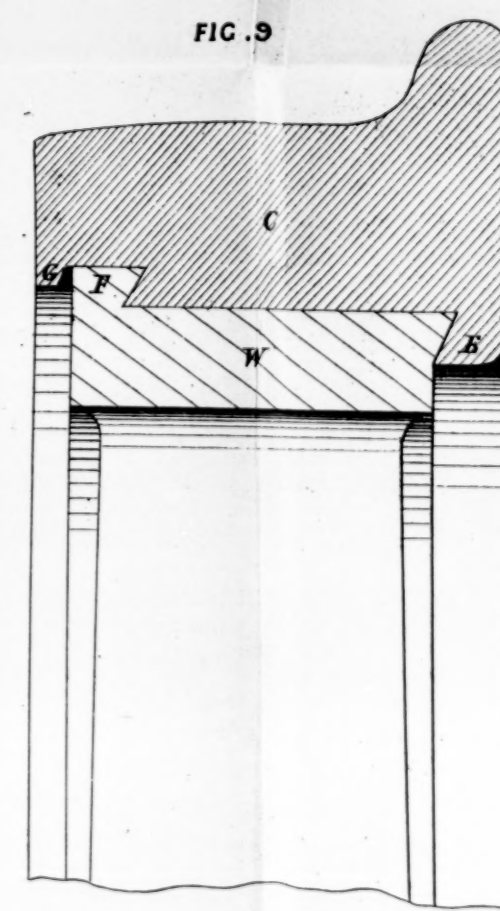


FIG. 14.

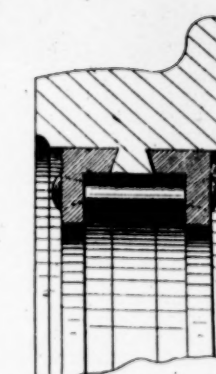


FIG. 15.

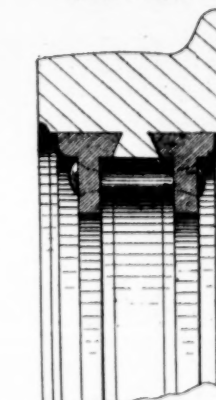


FIG. 12.

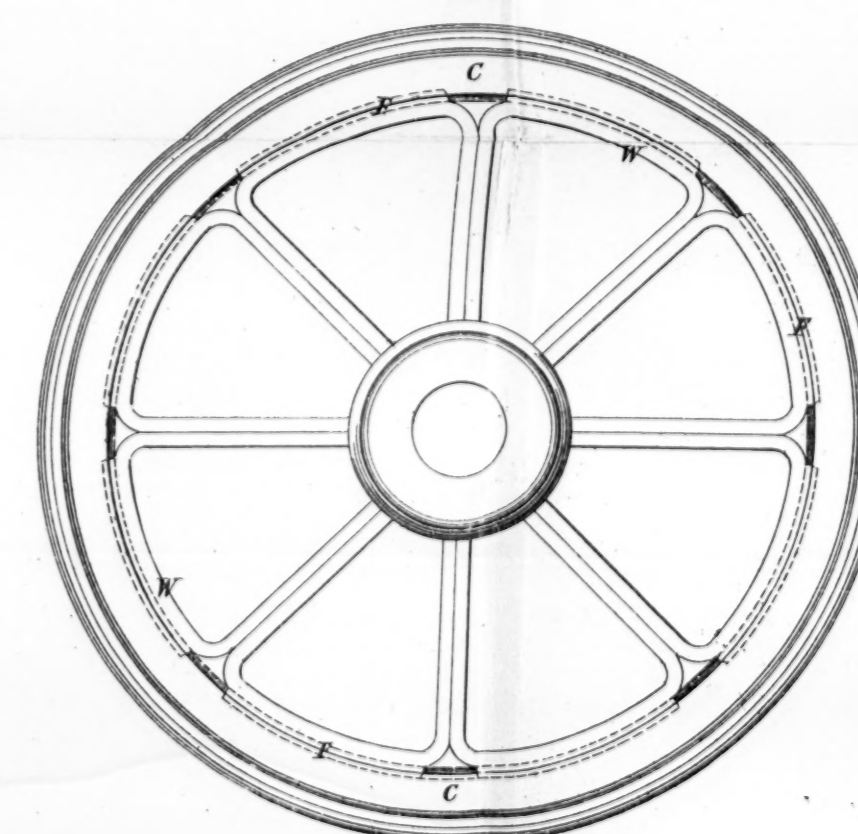
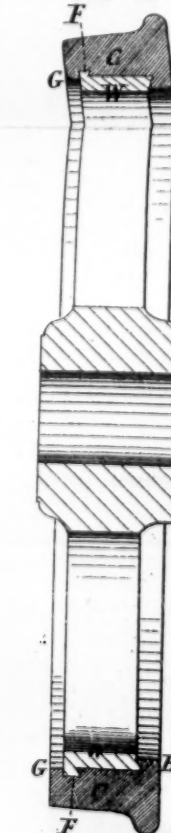
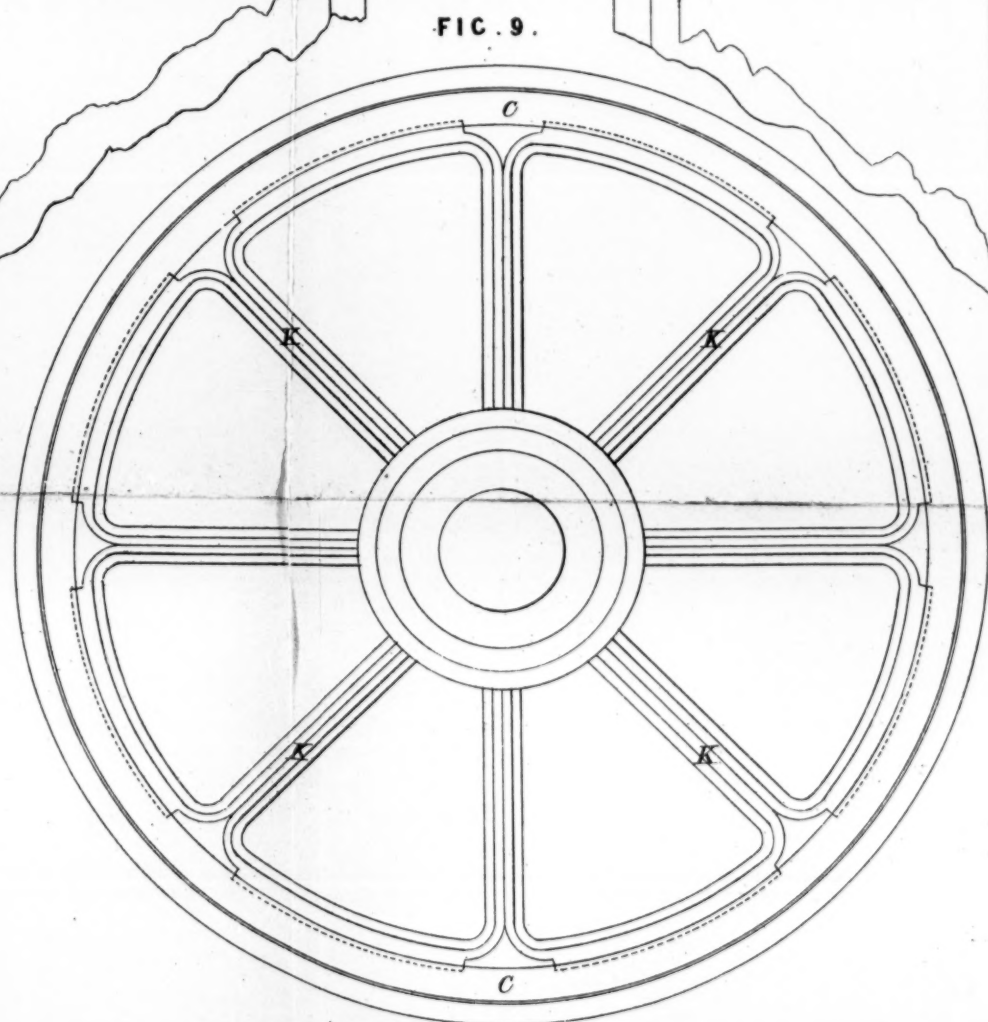
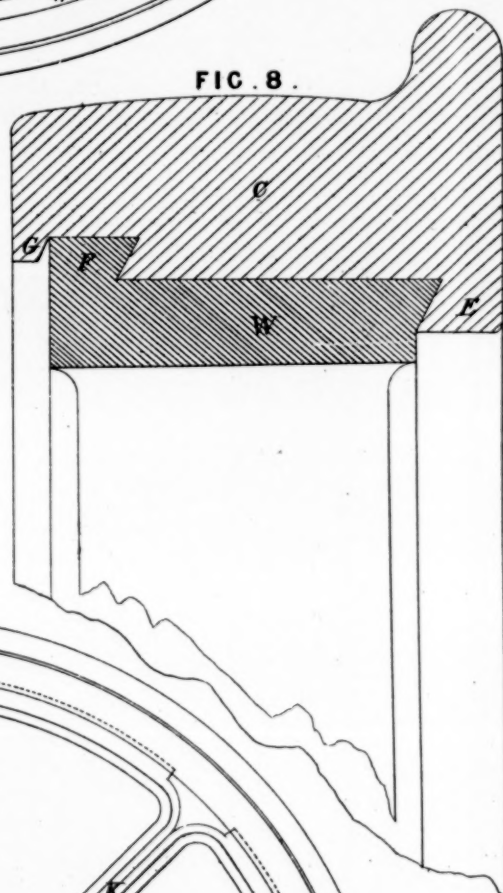
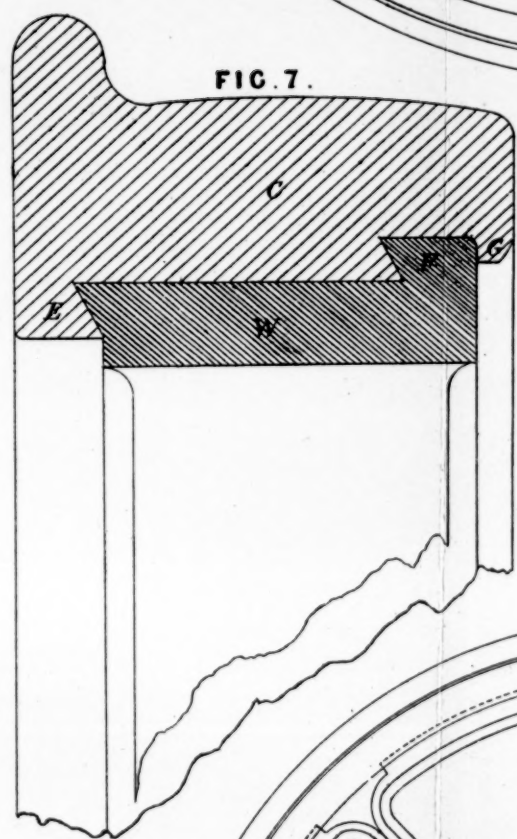
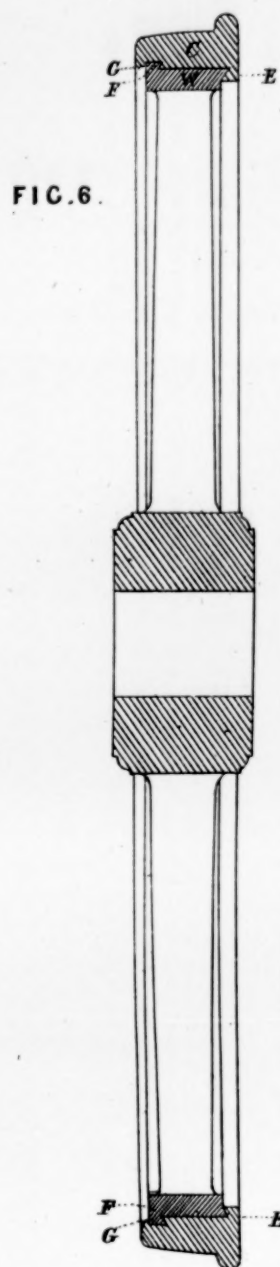
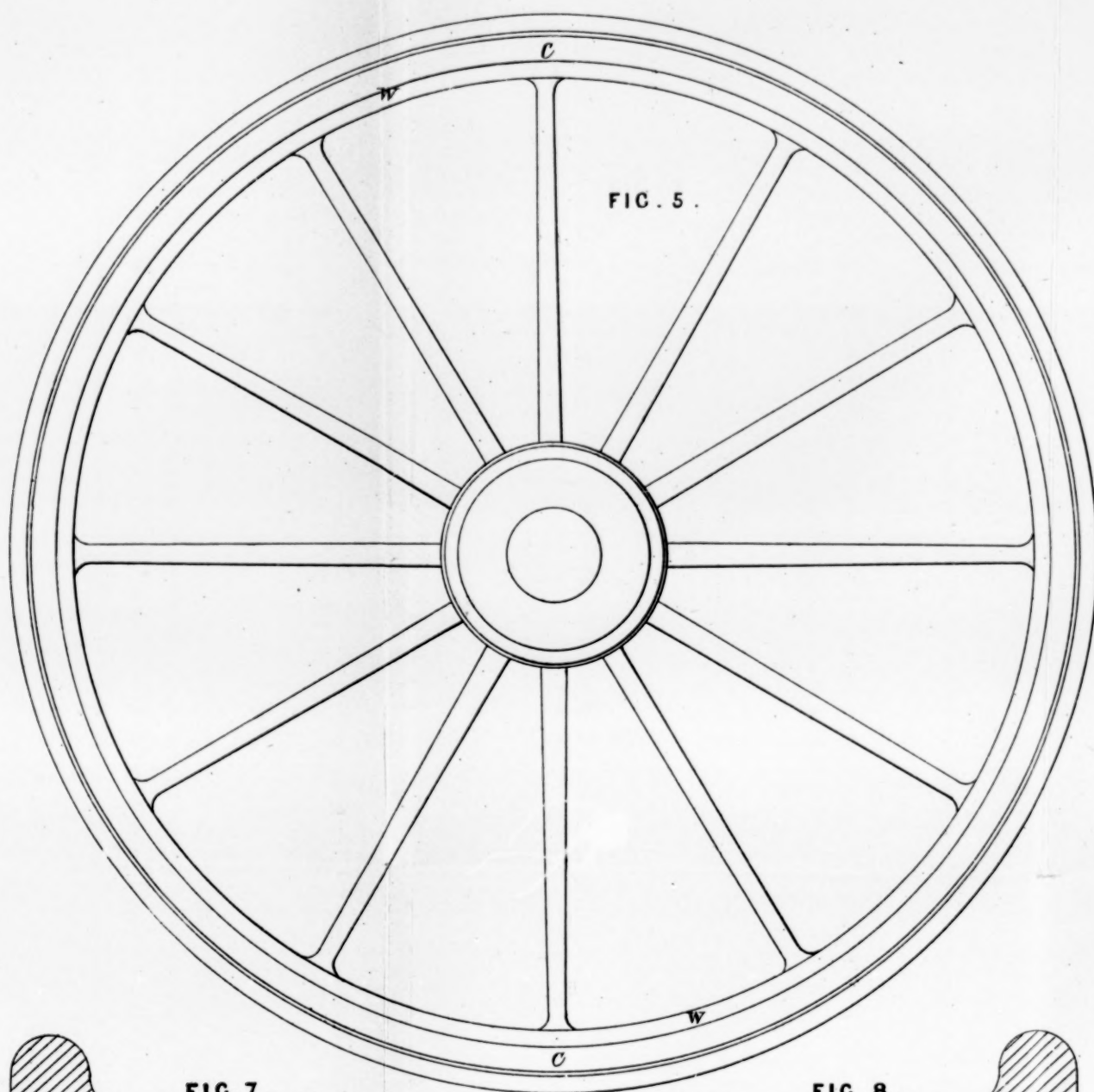


FIG. 13.



The filed drawing is not colored.



The drawing left with Provisional Specification is not colored.

Malby & Sons, lith.

FIG. 1.

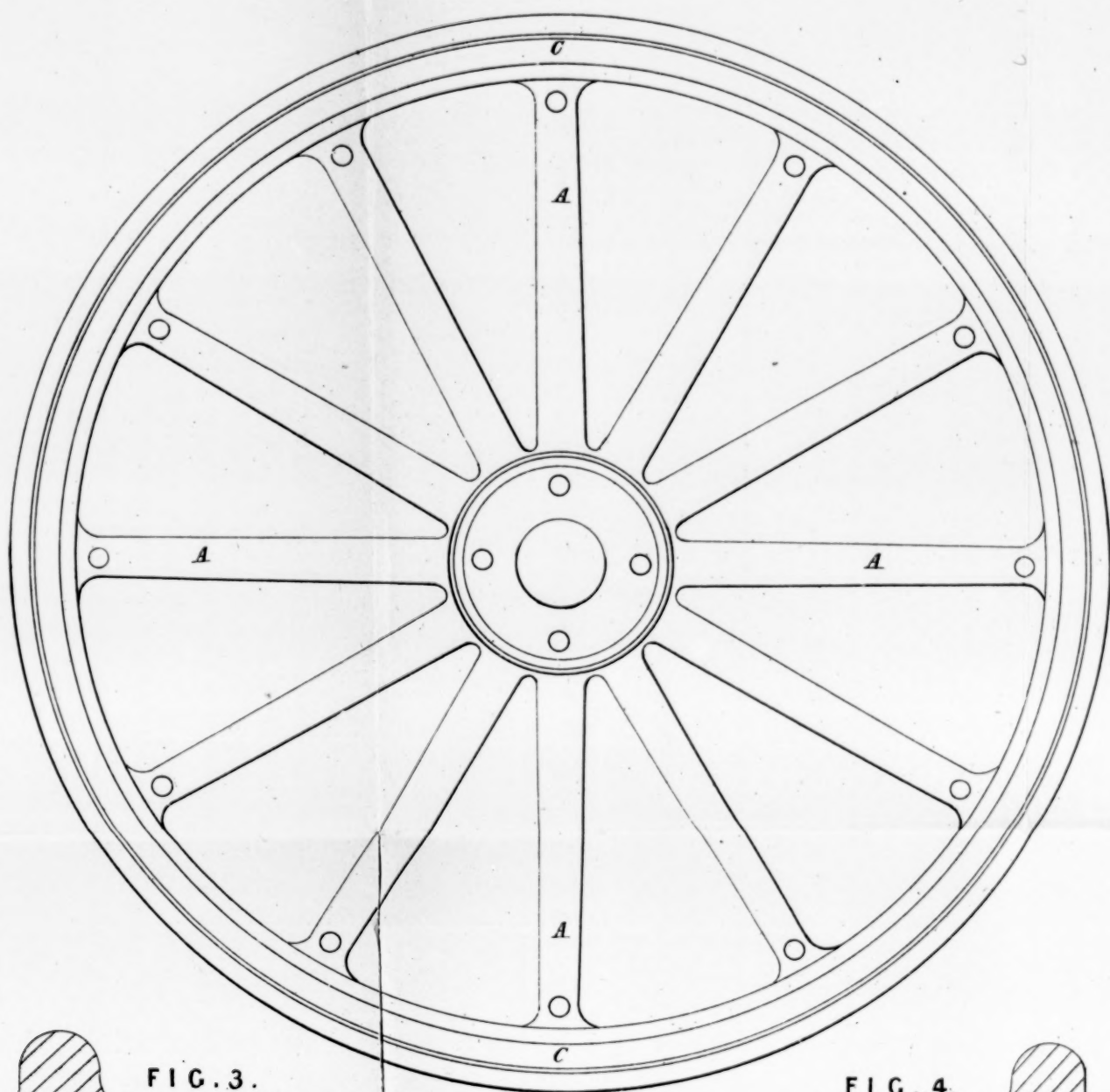


FIG. 2.



FIG. 3.

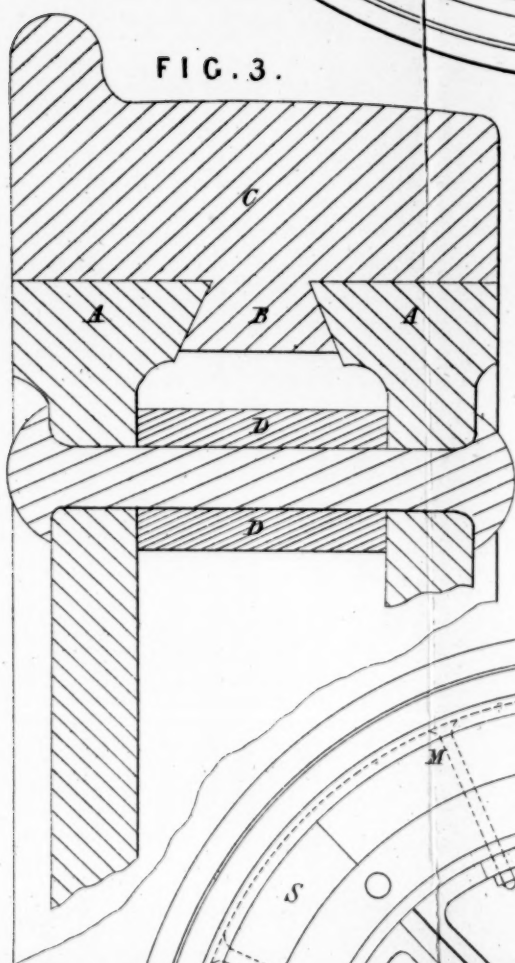


FIG. 4.

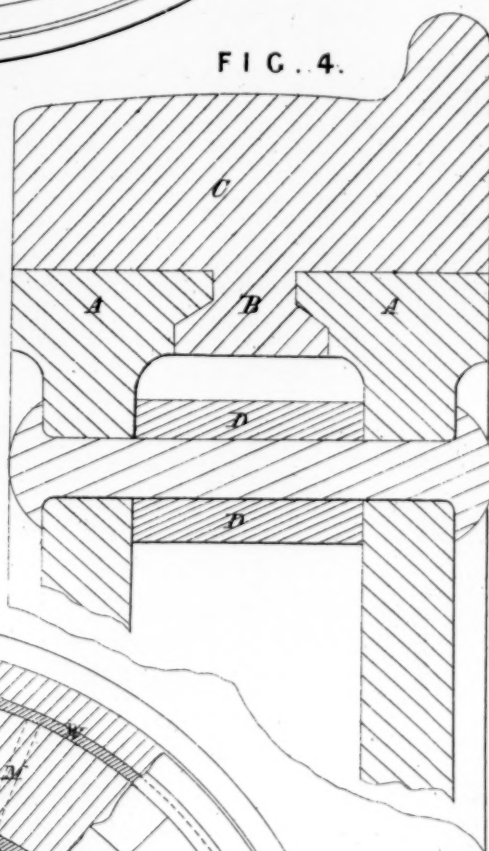


FIG. 11.

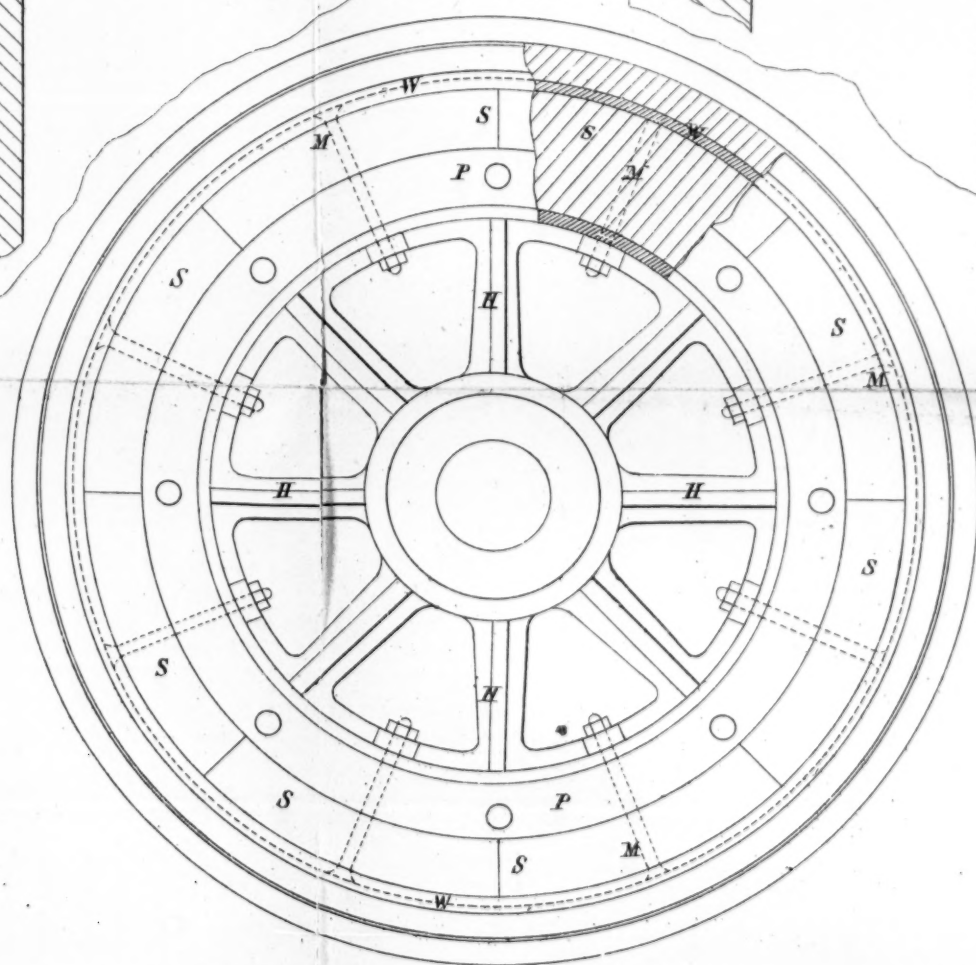


FIG. 12.



The drawing left with Provisional Specification is not colored.

Malby & Sons Ltd.

Fig: 1.
ENGINE N° 23. KRUPP'S STEEL TIRES.
The dotted lines denote the wear.
4. 6" diameter.

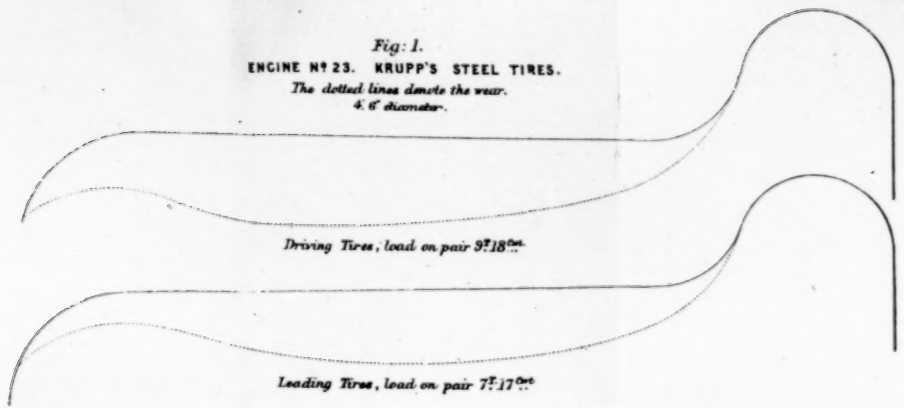
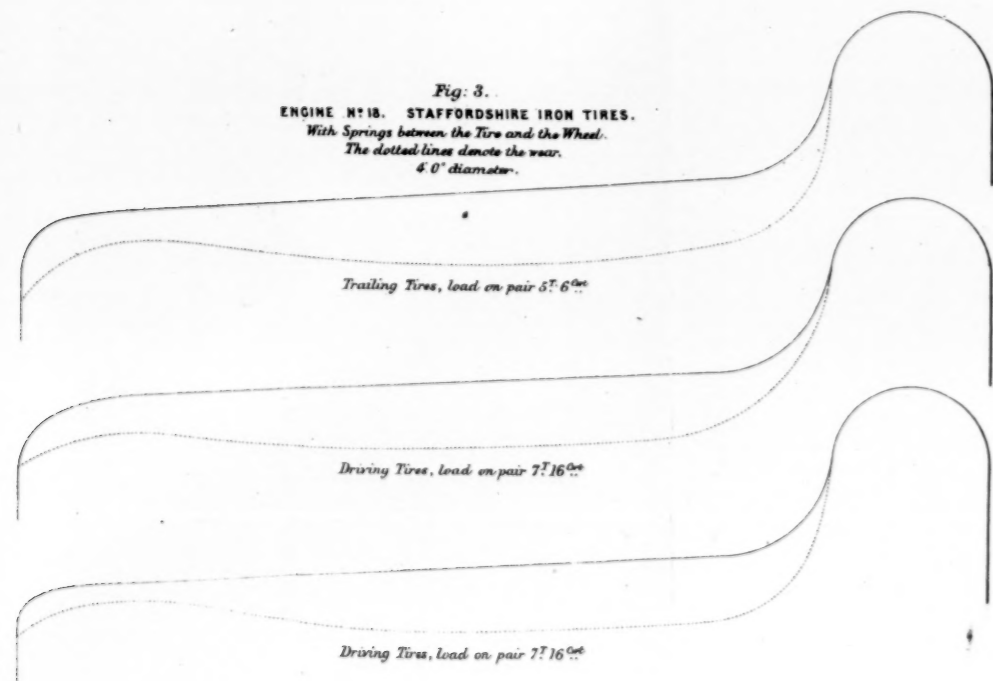


Fig: 3.
ENGINE N° 18. STAFFORDSHIRE IRON TIRES.
With Springs between the Tire and the Wheel.
The dotted lines denote the wear.
4. 0" diameter.



Note: - The Trailing Tires with the lightest load are most worn.

WEAR OF ENGINE TIRES

Fig: 2.
ENGINE N° 4. HOOD AND COOPER'S BEST LEADS IRON.
The dotted lines denote the wear.
4. 6" diameter.

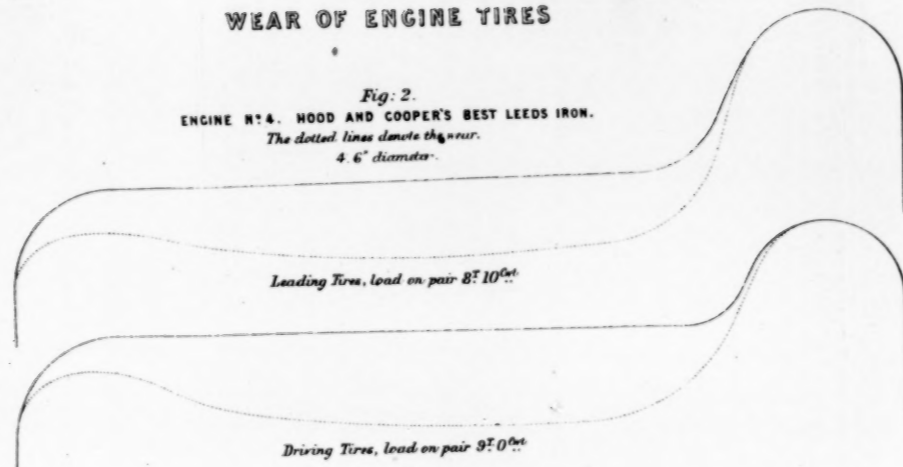


Fig: 4.
ENGINE SPRING-TIRE.

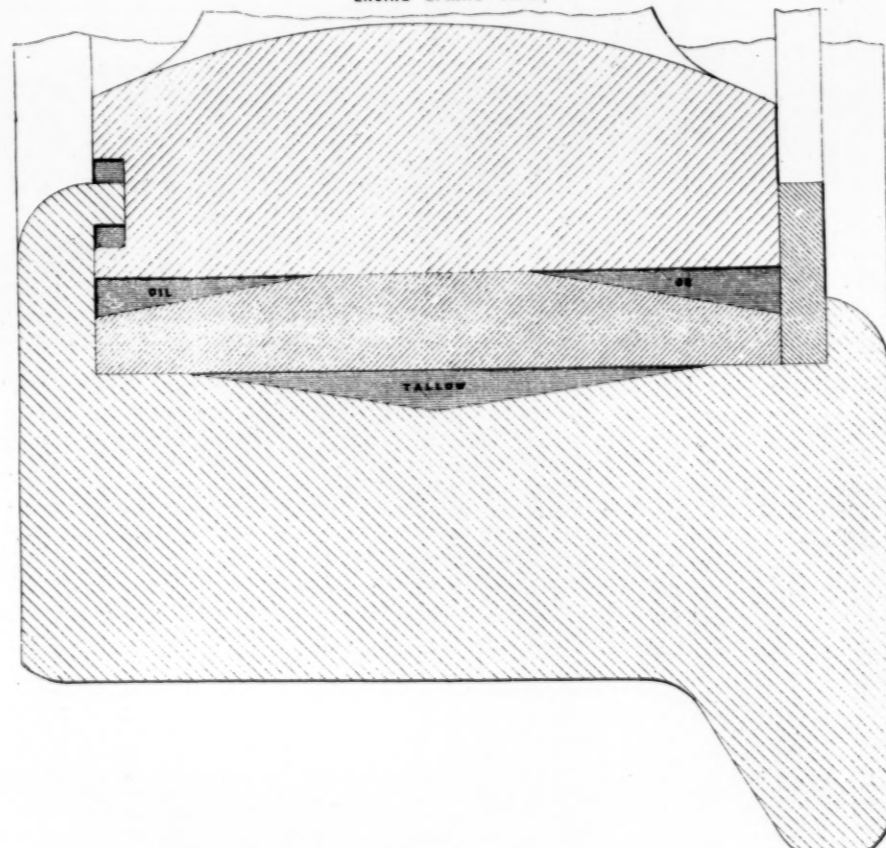


Fig: 5.
WAGON WASHER-TIRE.

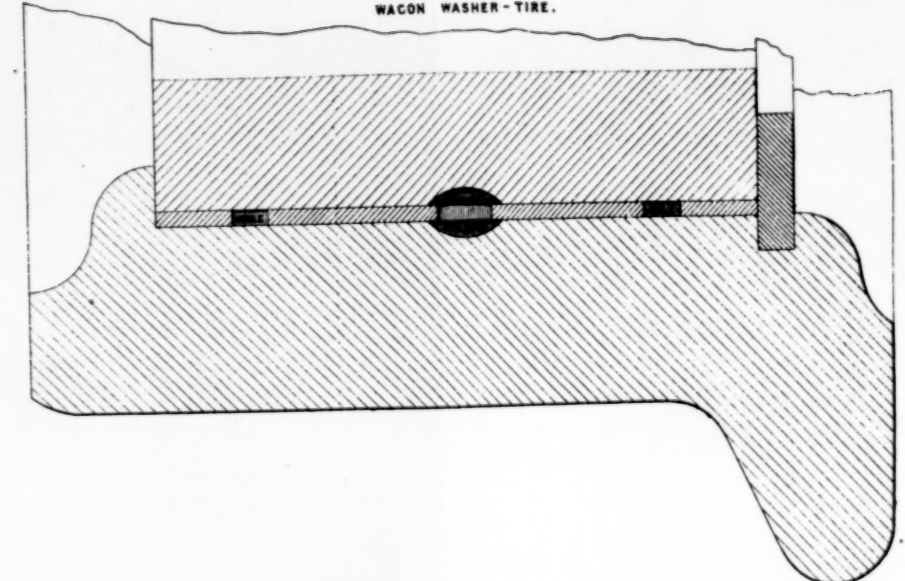


Fig: 6.
IMPROVED FISH PLATES.

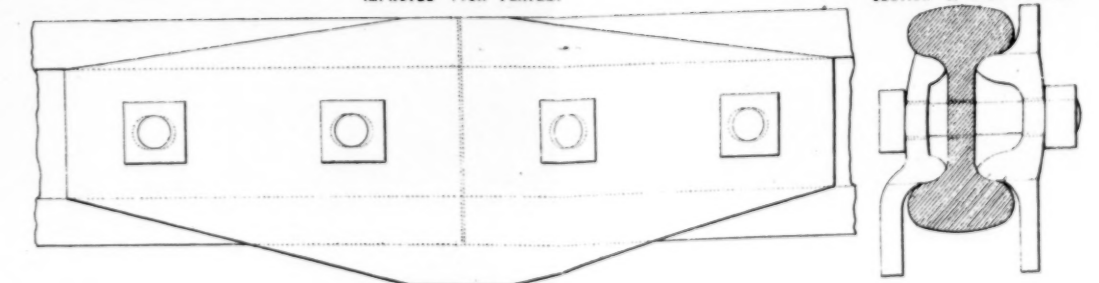
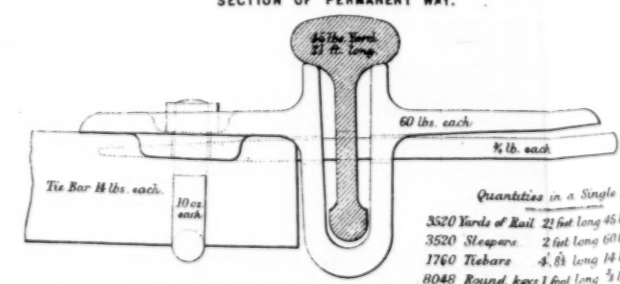
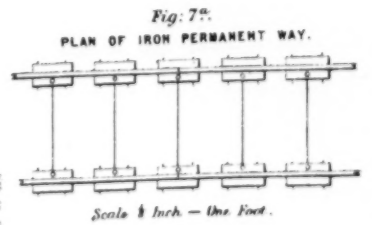


Fig: 7.
SECTION OF PERMANENT WAY.



Quantities in a Single Mile

Item	Quantity	Weight (lbs.)	Weight (tons)
3520 Yards of Rail	21 feet long 45 lbs. each	70.14	
3520 Sleepers	2 feet long 60 lbs. each	94.6	
1760 Tiebars	4.8 feet long 14 lbs. each	11.0	
8048 Round keys	1 foot long 1/2 lb. each	2.14	
3520 Nut head bolts	10 ea. each	1.0	
		179.14	



*N. Hodge,
Wheels,
No 8,979 Patented June 1, 1852.*

Fig. 1.

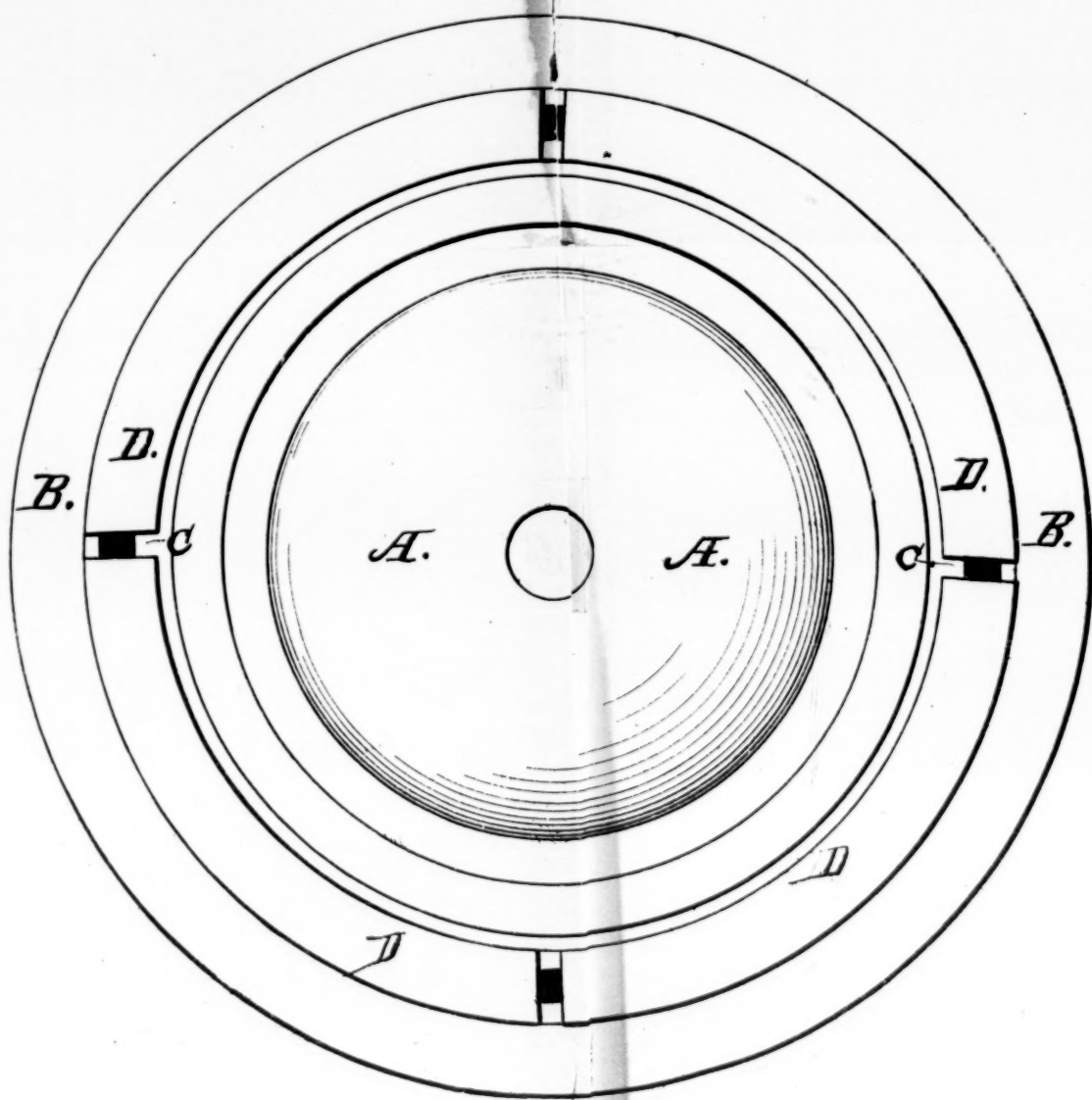
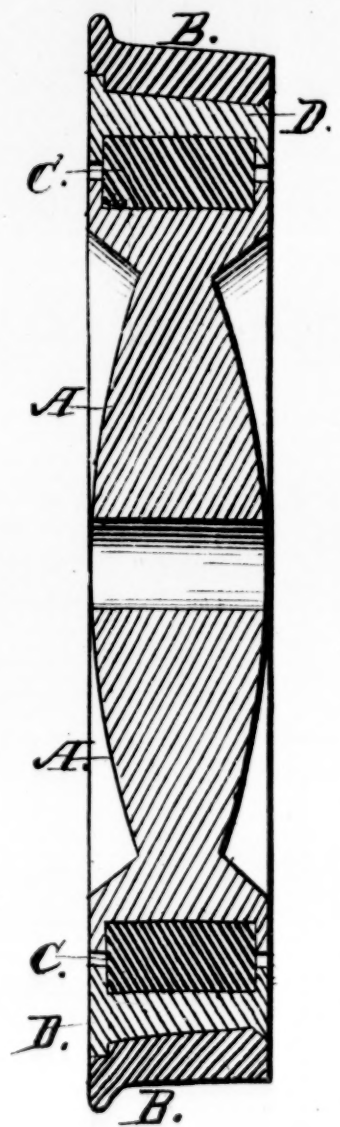


Fig. 2.



A

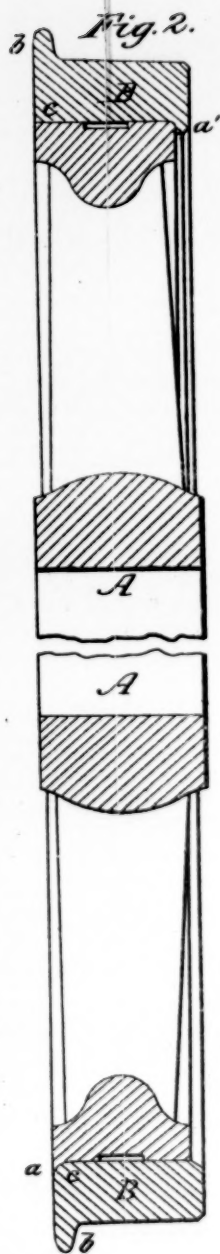
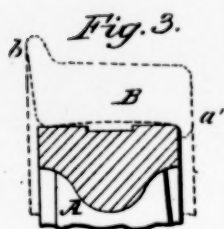


Exhibit A of
The W Bates Deposition
John Phillips
Notary Public

Plan C.

(Drawings from measurements taken from
The Schooner American Union of Chicago)

By Wm H Bates ship builder

Mar 20th 1877

Scale - $\frac{1}{8}$ inch equals one foot

No. 243 }
Winslow } page 369.
v. }
Wiley }

Height over native structure

25 ft high in $\frac{1}{4}$ mile	}
37 " " " $\frac{1}{4}$ "	
61 " " " $\frac{1}{2}$ "	
85 " " " $\frac{3}{4}$ "	
119 " " " 1 "	

Lawrence of light

Shadow of corn

High water line

{ Shadon of rigging timber heads

Shadow of hill

Shadow of anchor time

Light over burn

Light overboard

shadow of anchor stock

Shadow of logging and
Timber heads

Inside line of rights

10 rods 165 ft

width of shadow
of hall

1.9665

121.48 m to wall
215.45 m to wall
309.32 m to wall
403.66 m to wall

Plan of

36th from
Tafelberg